United States Court of Appeals

for the Second Circuit

APPENDIX

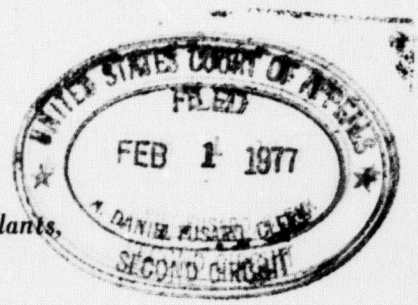
76-7434

ORIGINAL

United States Court of Appeals

For the Second Circuit

Docket No. 76-7434



MICHAEL MEEROPOL and ROBERT MEEROPOL,

Plaintiffs-Appellants,

–against–

LOUIS NIZER, DOUBLEDAY & CO., INC. and FAWCETT PUBLICATIONS, INC.,

Defendants-Appellees.

B P/S

On Appeal from the United States District Court
for the Southern District of New York

APPENDIX

VOLUME III
Pages A427 thru A687

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
Attorneys for Defendant-Appellee Louis Nizer
40 West 57th Street
New York, New York 10019
(212) 977-9700

SATTERLEE & STEPHENS
Attorneys for Defendants-Appellees Doubleday & Company, Inc. and Fawcett Publications, Inc.
277 Park Avenue
New York, New York 10017
(212) 826-6200

MARSHALL PERLIN
36 West 44th Street
New York, New York 10036
(212) 661-1886

SAMUEL GRUBER
218 Bedford Street
Stamford, Connecticut
(203) 323-7789

MAX R. MILLMAN
1420 Walnut Street
Philadelphia, Pennsylvania 19102
(215) KI 6-5950
Attorneys for Plaintiffs-Appellants

Printinghouse Press – Bar Ass'n Steno Serv. (Appeals Section) 212-687-0384

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AFFIDAVIT IN BEHALF OF PLAINTIFFS OF JOHN WEXLEY
SWORN TO MARCH 23, 1975

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK
- -x

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Plaintiffs,

- against -

LOUIS NIZER, DOUBLEDAY & COMPANY, INC.
and FAWCETT PUBLICATIONS, INC.,

Defendants.

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN WEXLEY, being duly sworn, deposes and says:

1. I reside at Ottsville, Bucks County, Pennsylvania. I am a writer by profession and have written books, plays and films since 1929. Among my writings, prior to my having authored THE JUDGMENT OF JULIUS AND ETHEL ROSENBERG, in 1955, are included two works of fiction based upon court proceedings which I had investigated and researched. These were "They Shall Not Die", about the famous Scottsboro case in the mid-1930's, and the screenplay: CONFESSIONS OF A NAZI SPY, a film based on the trial and conviction of Nazi agents who had been apprehended in the United States.

2. Upon my return from Mexico in January of

1952, I noticed an advertisement in the magazine THE NATION, which offered for a nominal sum the full transcript of the entire court proceedings in the case of the United States vs. Julius Rosenberg, Ethel Rosenberg and Morton Sobell. Since this case had been discussed in the press and aroused my interest, I sent for the transcript of the trial.

3. While my initial interest in the Rosenberg case had been that of a dramatist, after studying the court record I discovered that many serious questions regarding the government's case remained unanswered. Questions so troubling that I decided to look into them.

4. From that time until my work was ready for publication in June of 1955, I continued to investigate these crucial aspects of the case. I shall refrain in this affidavit from itemizing all of the cities I travelled to or all the persons whom I interviewed or all the court records I examined having relevance to the Rosenberg case, or all of the documentary material I accumulated in this investigation.

5. As an example, I refer to the work I had done in investigating the truthfulness of the testimony of Harry Gold. It was clear that his testimony was essential to the prosecution's case

in seeking to establish the alleged transfer of classified information to the Soviet Union. Thus, after completing my study of all the court records involved in the Rosenberg case, I then turned to the case of the United States vs. Brothman et ano, in which Harry Gold was the leading witness, U. S. Attorney Irving Saypol, the prosecutor in the Rosenberg case, was in charge and Kaufman, the same Judge who presided in the Rosenberg case was the trial judge. In addition, I researched the case of Alfred Dean Slack, who had been prosecuted in the Federal Court in Tennessee as well as several other cases

Turning again to Harry Gold, I examined all the proceedings in the Federal District Court in Pennsylvania, at Philadelphia, where Gold had been indicted and arrested and where he pleaded guilty and, of Gold's attorney, the FBI agents and Gold himself.

6. I then investigated and interviewed people in Philadelphia, where Gold had resided; subsequently travelling to Cincinnati, Ohio, where for some years Gold had attended college. There I interviewed various persons who had dealings with him during those years.

7. Continuing my research I travelled to

Santa Fe and Albuquerque, New Mexico, where Gold had allegedly made contact with Klaus Fuchs and David Greenglass. Retracing all the steps in his testimony, I checked out his claims to have registered at the Hotel Hilton in Albuquerque in June of 1945. In the course of that investigation, I sought and obtained various records which cast serious doubts on the Gold testimony and his alleged trip to New Mexico.

8. My independent investigation also encompassed important other aspects of the case, including the seizure and kidnapping of Morton Sobell in Mexico and the obtaining of official records of the government of Mexico pertaining thereto and further studied certain pretrial statements given by David Greenglass and his wife to their attorney which, I felt, case serious doubt upon the credibility of the Greenglass' testimony.

9. In setting forth the above items illustrating the scope and nature of my investigation which was a precondition for the writing of my documented study of the Rosenberg-Sobell trial, my intention is not to argue or seek to prove by this affidavit that the conclusions I arrived at were totally correct or that the Rosenbergs were unfairly tried and wrongfully convicted for a crime which they did not commit. That

is surely not the purpose of this affidavit. It is, rather, to indicate to the Court the scope and nature of the investigative work, the seeking of primary sources of information which I relied on in the writing of my book.

10. An examination of my book will illustrade that it is a detailed report of those areas of analysis and investigation which I tried to present with meticulous care for accuracy and which I fully documented by footnote indication all of the source material, giving the reader, scholar and historian every possible reference which could be verified and double-checked. Whenever I quoted from any record, I did so with painstaking care. If I deleted any portion of the document, I so indicated in order that the reader would be fully aware of that fact. Where my analysis was based upon argument, speculation, or my personal belief or opinion, this, too, was made clear and all such passages were identified as such. Thus, my book, far from being a reconstructed account involving any flights of fancy, was religiously based upon facts from start to finish.

I do not believe I took any "poetic" or "Author's license" in dealing with the facts except in some rare instances where their procedure was stated

frankly. In short, my book does not contain any invention, fictionalized presentation of the transcript selections, edited dialogue or anything else of that manner of popularized writing. I do not believe an honest documented work sanctions such liberties if it is to command respect. My book has been frequently called the "definitive work" on the Rosenberg case and it is with some degree of satisfaction that this writer feels he has made this contribution in the interests of truth and justice.

11. It is with this background that I came to read THE IMPLOSION CONSPIRACY, a book in which the author stated that "he was going to know as much about the Rosenbergs and the trial as was humanly possible to know", and that in his book there "is no place for fiction or even imaginative reconstruction. That is the path to a counterfeit presentation. Authenticity is the key."

12. Unfortunately, however, a reading of the Nizer book shows that it is completely devoid of footnotes, references, index or even any chapter headings which might aid the reader to check back and make comparisons. Moreover, one cannot help but be dismayed by the following derelictions from the author's stated purpose of authenticity and ethical conduct:

(a) Not only had he copied, verbatim and without permission extensive passages and paraphrased much of my writings in THE JUDGMENT OF JULIUS AND ETHEL ROSENBERG; but -

(b) In many instances whether in paraphrasing or copying verbatim, he had either placed them out of context or by other devices distorted their meanings;

(c) He purports to set forth exhibits of the transcript of the trial when, in fact, he has altered by deletion or otherwise the trial record itself.

13. He purports to set forth testimony from the trial which, in fact, is only fantasized fictitious conversation and then falsely imputes and attributed statements to persons which have no foundation in fact and which are for the most part the products of the retroactive reconstruction of the author, Mr. Nizer.

14. Thus, in sum, the Nizer book, using his own criterion that the book which he intended to write should have "no place for fiction or even imaginative reconstruction", it turns out that he has himself pur-

sued "the path to counterfeit presentation". Whereas Mr. Nizer declared that his objective was "to know every inch of the thousands of pages of the record", we find that his book contains palpable misstatements of the very record which he purports to know "every inch of".

15. As Nizer himself acknowledges in his front pages, he had access to my book and it would be pertinent here to give the background of this acknowledgment. In the fall of 1969 the film director Otto Preminger had read my book, THE JUDGMENT OF ETHEL AND JULIUS ROSENBERG and had a meeting with me to explore the possibility of his purchasing the film rights to my book. My agent had given Preminger my book and after he had read a substantial portion a meeting was arranged in New York City. There were two prime matters that arose in the course of that discussion and subsequent telephone conversations which prevented any final agreement. Of utmost importance, of course, was the desire to maintain the integrity of my book and the point of view projected therein, especially in the event it was made into a film. Further, the price for the motion picture rights remained unsettled as was the question of my writing the screen plan. In any event, Otto Preminger did not return the book to my agent or myself.

16. I have been advised by Marshall Perlin, attorney

representing the plaintiffs in this action, that in depositions Mr. Preminger has acknowledged giving my book to Nizer and that the latter, in turn, has acknowledged reading my book. Numerous pages of this copy of my book were written on and marked by Mr. Nizer and copies of those pages have been given to Mr. Perlin by the Nizer attorneys and I have examined those pages. This examination served to verify the evidence I had initially obtained from first reading THE IMPLOSION CONSPIRACY.*

17. With respect to my examination of the pages of my book which have been marked up by Mr. Nizer, I found that the inside cover, the fly leaf and title pages have various notations and page references to my book, namely THE JUDGMENT OF JULIUS AND ETHEL ROSENBERG. A copy of the same is appended to this affidavit (Exhibit A). The following page references were made by Mr. Nizer:

176, 35, 249, 259, 260, 264, 267, 268, 269, 271, 519, 114, 263, 264, 558, 81, 104-9, 113, 118, 125-7, 485, 564, 131, 196, 198, 199, 200, 243, 245, 459, 461, 494, 3, 106, 85, 87, 88, 119, 199, 306, 460, 627, 629, 631, 634.

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* I may say while the defendants on the acknowledgment page of THE IMPLOSION CONSPIRACY acknowledged that my book was "helpful in special details" and incidentally, misstates and misspells the title of my book, neither Doubleday, Nizer or Preminger ever sought or received my permission orally or in writing to use or excerpt any portion of my book. Indeed, they never

Within the text of the book, I find that the following pages were also marked by Mr. Nizer:

XIII, XIV, 3, 21, 23, 35, 44, 45, 46, 47, 49, 50, 81, 82, 83, 84, 85, 87, 105, 106, 107, 108, 109, 110, 113, 121, 125, 126, 131, 143, 178, 179, 180, 196, 199, 200, 233, 242, 243, 245, 249, 264, 265, 267, 268, 269, 270, 271, 485, 494, 519, 558, 627, 629, 630, 631, 634.

A copy of the same is appended to this affidavit (Exhibit B).

18. A further examination of my book utilized by Mr. Nizer and a careful comparison with his book, THE IMPLOSION CONSPIRACY, clearly reveals that the above page markings were not made for reference, additional research or to verify my findings, but rather for the purpose of verbatim copying and close paraphrasing.

19. The number of such instances are so many that I will make specific reference only to a few. It should be noted also that on pages where there are no such markings, Mr. Nizer nevertheless engaged in the same practice of either verbatim copying, paraphrasing, or rearranging my own literary work, often to the point of distortion. Examples of outright verbatim copying or copying with changes by paraphrasing

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communicated with me in any respect thereto, and, in accordance with standard practice, failing even to request my consent to the "honor" of their acknowledgment.

are provided by the following comparisons:

(I) Regarding the WEXLEY pages 270, 271: Here can be seen the full listing of the jurors and alternate jurors, their residence and background, as derived from a painstaking study of the voir dire as well as from other sources.

Compare with NIZER page 43: Exact copying with minor word deletions.

(2) WEXLEY page 104. "In winter . . . the roof leaked so badly that icicles formed from the ceiling drip."

NIZER page 15. "The roof leaked . . . in winter, icicles hung from the ceiling. . ."

(3) WEXLEY page 105. "When Julius . . . was enrolled at Public School 88 he entered the Downtown Talmud Torah at the same time. Here he studied Hebrew and Biblical philosophy, and was graduated with the highest honors."

NIZER pages 15 and 16. "Julius went to Public School 88, and at the same time received religious education at the Downtown Talmud Torah. He studied Hebrew and Biblical philosophy and was graduated with the highest honors."

(4) WEXLEY page 105. "My father, a garment worker, was in a long strike against sweatshop conditions.'

NIZER page 16. "His father, as shop chairman, was active in a garment strike against sweatshop conditions. He lost and was blacklisted."

(5) WEXLEY page 106. "One day I stopped to listen to a speaker on a street corner meeting . . . (etc. etc.) from school friends and neighbors . . ."

NIZER page 16. "One day, as (Julius) later wrote: '. . . I stopped to listen to a speaker at a street corner meeting . . . His topic was to win freedom for Tom Mooney, labor leader who was imprisoned on a frame-up.

"That night, I was reading a pamphlet (etc. etc.) Then I began (etc.) to collect signatures on a Mooney petition from school friends and neighbors . . ."

(6) WEXLEY pages 106 and 107. "In the year 1933 another frame-up came to national attention. It was that of the nine Negro boys sentenced to death in Scottsboro . . . on perjured testimony, most of it from a self-admitted prostitute . . . By 1934, when Julius entered the College of the City of New York . . . In his published letters Julius relates this incident in his freshman year . . ."

(7) NIZER page 17. "He involved himself in the struggle to free the nine Negro Scottsboro boys sentenced to death for rape on the testimony of a prostitute . . . In 1934, he entered City College of New York . . ."In his freshman year, he later wrote . . ."

(8) WEXLEY page 125. "It was a very cold winter the year Ethel Greenglass met Julius Rosenberg and the two would sit close to the kitchen stove to keep warm."

NIZER page 18. "In winter . . . he would . . . huddle with his family (the Greenglass family) around the coal stove in the kitchen."

(9) WEXLEY page 259. "He (Kaufman) was a little man, at most five feet six inches; with brown eyes, black hair, and wearing glasses. There was a wide mouth . . . and unusually heavy jaws . . . To Mr. Bloch (Julius' attorney) Julius stated that Kaufman looked like a cross between an austere rabbinical student and a cherub-faced buck sergeant."

NIZER pages 29, 31. Describing Kaufman's appearance: ". . . his five-foot six-inch frame . . ." "His black, flattened-down hair, brown eyes framed by glasses, wide mouth and heavy, clamping jaws . . ." "When Julius Rosenberg first saw him . . . he whispered to his lawyer, 'He looks like a cross between a rabbinical student and an Army sergeant."

(10) WEXLEY page 458. "That April 13, 1953, some two years after the trial and some two months before the Rosenbergs were executed, THE NATIONAL GUARDIAN published the startling story how one of its staff, Mr. Leon Summit, happened to find and authenticate the Rosenberg table."

NIZER page 407. "On April 13, 1953, THE NATIONAL GUARDIAN, a pro Communist paper, announced the missing console table had been found."

(11) WEXLEY page 44. "For four and one-half days of the one-week trial Harry Gold was on the witness stand and it is from his own direct examination and cross-examination . . ."

NIZER page 164. (Referring to the Brothman trial preceding the Rosenberg trial, Nizer writes about Gold:)

> "He had been on the stand in direct and cross-examination for four days in a one-week trial."

(12) WEXLEY page 45. "Contrary to that story . . . I actually had no wife and two twin children . . . I was a bachelor and always had been one . . ."

NIZER page 164. (Here, Nizer presents this quote from Gold's testimony at the Brothman trial confessing his lying:)

"Contrary to that story . . . I actually had no wife and two children . . . I was a bachelor and always had been one . . ."

It is quite apparent that Mr. Nizer never bothered to read or study the Brothman transcript but relied on my description and selections so that when he appropriated whatever he wished or needed from my book, he copied verbatim the precise excerpts from the transcript of the Brothman trial which I had selected, and it is noteworthy that he even copied my personal deletions and elipses. In the example below, Mr. Nizer also uses my parenthetical insertion of "(Gold).":

(13) WEXLEY page 49. "Judge Irving Kaufman . . . addressed Brothman's attorney impatiently:

"The Court:. . . The witness (Gold) said he concocted these things from beginning to end. Are you going to take each and every detail he concocted?"

NIZER page 164. Here is Nizer's quote from Judge Kaufman "as he chided Brothman's attorney":

"The witness (Gold) said he concocted these things from beginning to end. Are you going to take each and every detail he concocted?"

(14) WEXLEY page 50. Referring to Gold's attorney's statement at the time of his sentencing in Philadelphia:

"Here is his attorney's statement at his sentencing:

'One time he told me that he thought Communism as a political dogma was no more than a victory of mediocrity in Russia. The record in this case was . . . that Harry Gold has never been a Communist and he is not a Communist now, nor was he in those younger days.'"

NIZER page 164 - 65 . . ."and his lawyer at the time of the 30 year sentence told the court: 'Let the record in this case show . . . that Harry Gold has never been a Communist and he is not a Communist now, nor was he in those younger days.'"

The copying verbatim or with minor variations of substantial portions of my book is carried on almost to the very last chapter. On page 477 of the Nizer book one finds the following:

"Fearing demonstrations outside the prison walls, such as had raged in Boston 26 years earlier, the night Sacco and Vanzetti were executed, the State and Federal government had taken special precautions. State troopers and police barricaded all approaches to Sing Sing. They were trained and prepared to prevent any public demonstration."

(15) On page 627 of my book we can see where Nizer, in his "scholarly research" derived not only the facts, but also my literary formulation:

"Within Sing Sing prison itself there was a tension. Outside its walls, barricading all approaches, was a veritable army of state troopers, police and unknown numbers of Federal undercover men. They were under stern command to prevent any public demonstration such as had taken place 26 years before in Boston, the night Sacco and Vanzetti had been executed."

20. In various portions of the Nizer book he purports to quote from the record although he fails to give any record reference or citation of authority with respect thereto. When his "portions of the record" are set forth, they are set in different type and lay-out to distinguish that portion of the printed page from the rest of the text. In some instances there is a slight indentation;in others regarding any of the parties placed in the court room Nizer's selections are set forth followed by a colon or other device to give the appearance of actual or genuine testimony.

21. However, examination of these pages reveals (unbeknownst to the lay reader of the book) in many instances that wherever Mr. Nizer presents so-called transcript excerpts, they differ substantially from what is in fact set forth in the trial transcript. Various devices are utilized by Mr. Nizer to accomplish this result either by giving purported questions and answers or by the literary device of an invented dialogue between two persons substituted for the true testimony. As a passing example I refer to pages 79 and 80 of the Nizer book:

22. On page 101 of THE IMPLOSION CONSPIRACY, there appears a fictitious conversation of an event which seems to be derived from the trial record. Not only is it not quoted precicely or derived from the trial record but an examination of the trial record and other court records will establish the

falsity of the conversation Nizer has set forth. When Nizer reports here a conversation between Greenglass, the latter's wife and the FBI agents at the time Greenglass was allegedly arrested, we find, in fact, that Greenglass was not present.

23. On pages 105, 106 and 107 of the Nizer book are examples of other forms of fictionalization in falsely importing to the reader that it was derived from the court records or that these were verifiable verbatim languaged attributions to a particular person. Pages 123, 126, 127 and 157 give further examples.

24. On page 159 of the Nizer book he purports to quote from Gold's testimony given at the trial in the form of dialogue. When such a literary device is employed in an alleged documented study of a public record, the author should not falsely portray what actually occurred in the court room.

25. In portions of the Nizer book relating to events both during the trial and thereafter, by the use of quotation marks, alleged conversations are set forth as taking place between the Rosenbergs and their attorneys, the Blochs.

26. From the time I commenced my investigation of this case in 1952 I had extensive discussions and interviews with the Rosenberg attorneys and made many inquiries regarding their conversations with the Rosenbergs. It is on the basis of these interviews and conferences with Emanuel Bloch and his associates and my knowledge of them as attorneys which permits

me to categorically state that those alleged conversations in THE IMPLOSION CONSPIRACY are false and fictitious. These falsified and fictionalized conversations can at best be charitably described as retroactive reconstructions and imaginings by Mr. Nizer. There is, one must say, a sharp contradiction in Nizer's representation on page 3 of his book that he would refrain from any "fiction or imaginative reconstructions." In truth, the Nizer book is rife with both and thus the author himself follows "the path to a counterfeit presentation." "Authenticity" thus becomes not the "key", but rather the "victim".

27. I have read with particular interest the closing portions of THE IMPLOSION CONSPIRACY relating to the days immediately preceding the execution and to the day of the execution itself. Here, one may see substantial portions of the events either extracted verbatim or paraphrased from my book. In many cases the slight alterations distort the import of my writings and in some cases the paraphrasing becomes a mutilation of my literary effort.*

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*I have recently examined portions of a book entitled THE BETRAYER by Jonathan Root and the manner in which my language was appropriated and misused by Mr. Nizer becomes clearer. Root, in his book, appropriates extensive portions of my writings, including those events in the days preceding the execution. It would seem in some instances that Nizer, in appropriating my work, did so not only directly, but also indirectly by doing his copying both from my book and the copying from Root's book which had copied from me.

28. It is my understanding that one of the matters at issue in this litigation involves the appropriation by Nizer of the copyrighted material owned by Michael and Robert Meeropol, letters written by their parents, Julius and Ethel Rosenberg. This misappropriation of the plaintiffs' property took place not only in the writing of the Nizer book, but in Nizer's appearances in the public media to "push" the sale of his book.

29. On February 27th ,1973 at 10:15 A.M., while at home in Ottsville, Pennsylvania, I listened attentively to a radio interview between Mr. Nizer and the well-known Martha Dean on the WOR radio station. Certain portions of the interview and particularly Nizer's statements are still vivid in my mind:

a) Throughout the broadcast Nizer would quote from the letters of Julius and Ethel Rosenberg, after first emphasizing his special treatment of the "love story" in THE IMPLOSION CONSPIRACY. He went on to extol the literary and artistic quality of the letters of the Rosenbergs with the comment that as people approach the time of anticipated death they rise to the heights of literary eloquence. He attributed to the Rosenberg letters these qualities, saying they even exceeded the eloquence and passion of the letters of

Sacco and Vanzetti and that they were set forth verbatim in his book.

b) He then went on to state that he personally had these prized "love letters" in his possession at that moment (giving the impression that he, personally, had unearthed them or had become the sole recipient of them) and that he would thereupon read them. This he did, on several occasions during the 45-minute interview. It was evident that he was relying on these letters to promote the sale of his book.

30. In this affidavit I have sought to touch upon just a few representative examples of the basic flaws in THE IMPLOSION CONSPIRACY and to afford examples upon which I premise my conclusion as a writer and a researcher, as someone personally acquainted with the details of this case. I come forward and make this affidavit because I believe the Court should be apprised of the true facts.

John W. Wexley

JOHN WEXLEY

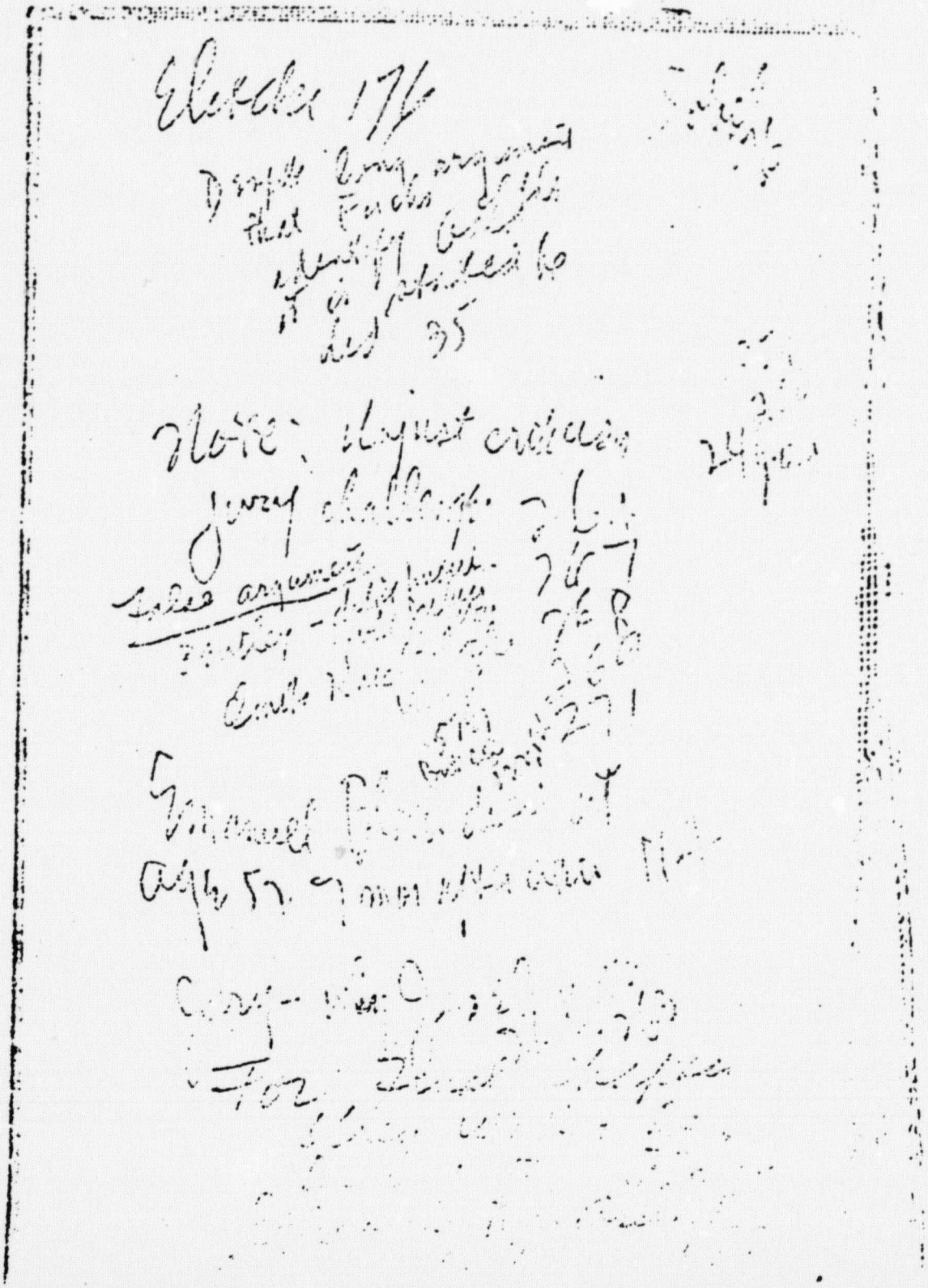
Sworn to before me this

23rd day of March, 1973.

MARSHALL PERLIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-8307700
Qualified in New York County
Commission Expires March 30, 1976

EXHIBIT A
(Annexed to foregoing Affidavit of John Wexley)

Copies of title and cover pages from Louis Nizer's copy of
THE JUDGMENT OF JULIUS AND ETHEL ROSENBERG



Ruth learned
by par 85

Typed
false argument
"Why did Ethel
have to confess?" (87)
or involve
Ethel when no one

THE JUDGMENT OF [illegible] 88

JULIUS AND ETHEL ROSENBERG

or (119)

nearly asks Ethel
to [illegible] against
us. Davis Cohen 144
306

Console Julie 400

during ? stay in [illegible]
outside of the
Prison. 627

Same inmates 627

Talk thru
mesh. 629
Last day

Presence of
Lds Marshall
2 FBI. men
+ open door 629

Ethel 631

[illegible] Mrs. Helen
Adams. 634

"To remain silent when your neighbor is unjustly persecuted is cowardice; to speak out boldly against injustice, when you are one against many, is the highest patriotism."

— ABRAHAM LINCOLN

EXHIBIT B
(Annexed to foregoing Affidavit of John Wexley)

Copies of pages from the text of Louis Nizer's Copy of THE JUDGMENT OF JULIUS AND ETHEL ROSENBERG

1953	
Jan. 2	Judge Kaufman denies motion for reduction of sentence.
Jan. 5	Motion for stay of execution denied by Court of Appeals.
Jan. 10	Petition for Executive Clemency submitted to Truman: executions stayed until five days after determination by President.
Jan. 20	Truman leaves office, and petition for clemency automatically passes to Eisenhower.
	Clemency appeals in U.S. attain unprecedented height of three million letters and telegrams to White House:
	Direct appeals by Dr. Albert Einstein, Dr. Harold C. Urey, Chief Justice James Wolfe (Utah Supreme Court), Rabbi Hillel Silver, 3,000 Protestant ministers, etc.
Feb. 11	Eisenhower refuses clemency.
Feb. 13	Disclosures that Pope Pius XII intervened for clemency in December of 1952, but that his appeal to White House was suppressed by Attorney General James P. McGranery. Pope Pius renews appeal for clemency.
Feb. 16	Judge Kaufman sets third execution date for week of March 9.
Feb. 17	Court of Appeals headed by Judge Learned Hand stays executions pending action by the Supreme Court.
Feb. 22	New York *Times* European survey reports all France unanimous for clemency. Rosenberg case "TOP ISSUE IN FRANCE." Appeals for clemency pour in from clergy, statesmen, scientists, writers from all countries in the world.
May 25	Supreme Court declines for second time to review case, Justices Black and Douglas now dissenting.
May 29	Judge Kaufman sets fourth execution date for week of June 15.
June 8	Motion for a hearing for a new trial argued before Judge Kaufman on basis of newly discovered evidence proving perjury and subornation of perjury by the prosecution. Kaufman refuses to grant hearing that same afternoon; refuses stay of execution.
June 10	Motion for new trial argued before Circuit Court of Appeals. Kaufman decision affirmed and stay of execution denied.

B

June 15 Supreme Court declines for the third time to review the case and refuses stay of execution. Vote is now 5 to 4.

June 16 New appeal, based on grounds that Atomic Energy Act of 1946 should have applied to the case, filed with Justice Douglas. Second clemency petition submitted to Eisenhower.

June 17 Douglas grants stay of execution stating that substantial question is involved whether defendants were correctly tried under the Espionage Act of 1917.

June 18 Clemency appeals to President Eisenhower from abroad by hundreds of organizations representing tens of millions in England, Germany, Italy, France, etc.

Mounting protests at many U.S. embassies by tens of thousands who were held back by police cordons. Direct appeals to Eisenhower from President Auriol of France, Edouard Herriot, former Premier Faure, etc.

Supreme Court called into extraordinary and unprecedented session. Justices recalled from their vacations to hear argument on Douglas stay regarding applicability of Atomic Energy Act.

Execution of the Rosenbergs automatically delayed pending Supreme Court decision.

June 19 Supreme Court vacates Douglas stay by vote of 6 to 3 (Frankfurter now joining Black and Douglas). President Eisenhower rejects second clemency plea.

Execution of the Rosenbergs, scheduled for 11 P.M. that night, moved up before sundown to avoid desecration of the Sabbath.

Union Square meeting of 10,000 people to protest the execution of the Rosenbergs. Simultaneously, in all capitals of the world, hundreds of thousands register dismay, shock and last-minute protest.

Julius Rosenberg executed at 8:02 P.M.

Ethel Rosenberg executed at 8:08 P.M.

June 20 Published text of Justice Black's dissent discloses that the Supreme Court "had never reviewed the record of this trial and therefore never affirmed the fairness of this trial."

THERE was a great unease throughout America that night following the execution of the Rosenbergs. No one could estimate how many were happy about it, how many indifferent, and how many felt a terrible thing had been done. But there could be no question that a vast number of people experienced the most profound disquiet. Even though they were constantly assured that the "A-spies" had been fairly tried and justly sentenced, two perplexing questions continued to gnaw at mind and heart:

If the Rosenbergs were really guilty, if no doubt whatsoever existed that they had received their full measure of justice, then why had the conscience of the world been so deeply aroused?

And if the Rosenbergs were truly innocent, why had they been put to death?

One could not airily dismiss as Communist propagandists men like Dr. Harold Urey, the Nobel Prize physicist, or Rabbi Abba Hillel Silver, friend of President Eisenhower. Such men could not be brushed aside as dupes or victims of "brain-washing." Nor could one ignore the astonishing revelation made by Justice Hugo Black that the Supreme Court "had never reviewed this trial record and therefore never affirmed the fairness of this trial."

Why, then, did so many Americans continue to say that the Rosenbergs had been accorded all due process of law? Why had the Supreme Court been convened into extraordinary session with such desperate haste to dispose of a case which Justice Frankfurter considered so vital that he declared "the magnitude of the issue called for the most prolonged consideration"?

Thus the two initial questions produced many more: Was it really

find that a state of mind was induced in the average American — one of unquestioning acceptance of everything put before him carrying, or seeming to carry, an official stamp — or as Dr. Perry refers to it, "a growth of credulity throughout society at large."

•

The "confession" of Klaus Fuchs was first revealed at his hearing at Bow Street Court, London, one week after his arrest. Only three witnesses were called: Commander Arnold, senior security officer, and his subordinate, William Skardon. These two officers described a series of interviews they had had with Fuchs over a period of four months, the result of which was the so-called confession. The third and only other witness was Dr. Michael Perrin, an atomic scientist, who told of a scientific interview with Fuchs at the time of his arrest. The details of this officially requested interview were not revealed publicly.

At the trial itself in Old Bailey, less than three weeks later, and which lasted only one hour and twenty-seven minutes, we learn that "there was no jury and no evidence beyond that offered at the prior Bow Street proceedings." Here is the testimony on this point as Mr. Skardon was questioned:

> "'Is it right that before you took a statement from him [Fuchs] there was *no evidence* upon which he could be prosecuted?'
> "'That is right,' Skardon testified."* (Emphasis added.)

Thus, at the very outset, we see that no substantiation of the professed crime exists other than the accomplice testimony of Harry Gold at the Rosenberg trial. As for Dr. Fuchs' weird Jekyll-and-Hyde confession, we find it has been subjected to cynical criticism by such prominent British writers as Rebecca West and Stephen Spender.†

In Miss West's opinion Dr. Fuchs is a "strange bird" and an "unbalanced egotist"; someone who seemed to have lived in a "Cloud-Cuckoo-land" all his life. She finds his confession "read like the

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*Excerpts from and description of the testimony at Fuchs' trial, officially disclosed excerpts of his confession, quoted material from the New York *Times* articles written by Rebecca West and Stephen Spender, and House of Commons minutes are all from the Joint Report.

†Miss West is the author of *The Meaning of Treason*, and has become known as an apologist for Senator McCarthy. (See *U. S. News and World Report*, July 3, 1953.)

Mr. Spender is a well known ex-Communist "expert."

five full months. Not only was he found entirely above suspicion but he was given such a clean bill of political health that eventually he was promoted to Deputy Chief Scientific Officer at the Harwell Atomic Energy Research Establishment. And yet, despite these facts, we are asked to believe the following claims by Dr. Fuchs:

> "When I learned about the purpose of the work [atomic research] I decided to inform Russia and I established contact through another member of the Communist Party.
>
> "Since that time I have had continuous contacts with persons completely *unknown* to me except that they would give information to the Russians." (Emphasis added.)

What support, if any, really exists that Fuchs was a Communist? There is only one source of such support: the Nazi Gestapo! This astounding disclosure was made by Prime Minister Clement Attlee in the House of Commons only five days after Fuchs' trial:

> "Not long after this man came into this country — that was in 1933 — it was said that he was a Communist. The source of that information was the Gestapo.
>
> "...When the matter was looked into there was *no support* for it whatever. And from that time onward there was *no support*. A proper watch was kept at intervals. He went to America. He came back to Harwell. On all those occasions all the proper inquiries were made and there was *nothing* to be brought against him." (Emphasis added.)

The Gestapo's accusation was made in 1934, one year after Fuchs arrived in England as a "refugee" from Nazi Germany. He was then twenty-three years old and had enrolled at the University of Bristol to complete his studies in mathematical physics, when the Chief Constable of that city received the report from the Nazi Consul there. It stated that Fuchs had been a member of the German Communist Party while a student in Kiel.

It will be recalled that it was a common practice for the Gestapo to plant its agents in Belgium, Holland, France and Norway as "anti-Fascist refugees." Some were given Communist credentials; some even claimed to be "escapees" from Nazi concentration camps.

Little wonder, then, that M.I. 5, remaining suspicious of the Gestapo ruse, shipped Fuchs off to a Canadian internment camp the instant the Nazis invaded the Low Countries in 1940. And at this point in Fuchs' record, we find another startling fact: that he was segregated from genuine anti-Nazi refugees and placed in Sherbrooke Camp

will be proved to be a total fraud in the next chapter). And that it was the discovery of this map which "unmanned" Gold and caused him to break down and confess.

5. That "quite by coincidence," less than one hour *after* Gold's confession, a cable was received from the FBI agents in London stating that Dr. Fuchs had at last identified Gold (tentatively, as it turns out) from the first motion picture.

6. And finally, that "two days later" additional word came from the FBI agents that Dr. Fuchs, having seen the second motion picture, was now "positive" that Gold was indeed "his American partner."

Thus, in simplified synopsis, runs Mr. Hoover's complicated account of what should have been a routine matter of identification, that is, if Dr. Fuchs had truly dealt with Gold. But what is abundantly clear is that Mr. Hoover gave the harried Fuchs precious little choice. For, when we turn to the newspapers, we see that the FBI chief was too impatient even to wait the two days for Dr. Fuchs' "positive" identification. On the night of May 23, only a few minutes before Gold's "whirlwind" arraignment, there was issued an official pronunciamento from the Washington office of the FBI. Here is the New York *Times* of May 24, 1950:

> "PHILADELPHIAN SEIZED AS SPY
> ON BASIS OF DATA FROM FUCHS
>
> "FBI Questioning of Atom Expert
> in British Prison Brings About Arrest
>
> ". . . The Government had announced in Washington (in a joint statement made by J. Edgar Hoover and Attorney General McGrath) that Gold had been arrested on espionage charges *based on information supplied by Dr. Fuchs.*" (Emphasis added.)

In essence, we see in all this about as palpable a piece of sleight of hand as ever was practiced. What actually happened was that Mr. Hoover simply forced Dr. Fuchs' hand by the "fait accompli" of announcing to the world that Gold had been arrested on the basis of Dr. Fuchs' questioning. But we have seen that Gold was *not* arrested on "information supplied by Dr. Fuchs," because according to Hoover's own words the information was not only so vague as to "fit millions of men," but it was also completely inaccurate!

By way of a final comment on the FBI's questioning of Fuchs, it must be noted that it took place *without* a proper independent witness present. No representative of the British Attorney General's office was present. No newspaperman was present. No one representing Fuchs as counsel; no one from British Military Intelligence or

There were other striking features about the Brothman trial which give strong basis for the belief that it was to a great extent a "try-out" for the big A-bomb spy "show" to take place in March, 1951.

For four and one-half days of the one-week trial Harry Gold was on the witness stand and it is from his own direct examination and cross-examination that we have the astounding tale of his romances, courtship, honeymoon, marriage, children, separation and divorce as recounted to Brothman, to fellow employees, to friends and acquaintances over a period of six years. Here, culled from the Brothman trial record, are the highlights as Gold had told them "in intimate detail":

While riding in a trolley car one day in Philadelphia he had met and fallen in love with a beautiful girl named Helen who had "one brown eye and one blue eye." He had tried to court her but a wealthy rival named Frank, whose uncle manufactured peanut-chew candy, had won out.

However, through Helen he had met another Philadelphia girl named Sarah, "a young, gawky, long-legged girl" who worked as a model in Gimbels and in time "developed into a comely, good-looking, young lady."

While courting Sarah, Gold had learned of another "suitor" — an "underworld character . . . with a reputation for conscripting girls for brothels." "In order to save her" from this sinister fate Gold was spurred into marriage despite some drawbacks about Sarah's family.

Her mother "was a slovenly woman, a poor housekeeper" and her father, rumored to be a gambler and a shiftless person, "could not support the family." Because Gold was "broke" at the time, the wedding had to be postponed again and again.

Finally the two lovers were wed and enjoyed their honeymoon in Atlantic City.

In the year 1935 Gold's "wife" gave birth to twins, a girl and boy named Essie and David. Soon after, Gold purchased a house "for his wife and family."

In the years that followed, as the twins grew older, Gold would tell incidents of their growing up, of their progress in school, how at one time little Essie broke her leg while playing, and another time how the boy David had developed polio but had fortunately recovered.

When in 1945 Brothman had first suggested to Gold that he work for him full time in New York Gold had declined giving as his reason that "his wife would not like to be transplanted"

to New York City from Abington, the suburb of Philadelphia where they had bought their new home. In fact, whenever he had to leave home on business trips Sarah had "resented" his absences. Eventually this caused a serious "rift" between Gold and his wife, since she had started to have an affair with an "elderly, rich real estate broker."

When this situation had resulted finally in his home being "broken up," Gold would sadly tell friends that he traveled on week ends to Abington to secretly watch his children "playing in the park," and that he surreptitiously "looked at them from afar," since he was unable to bear the pain of visiting them in his formerly happy home.

In addition to this tragedy of his "family life," Gold had also told of "the death of [his] brother while in service for his country." In 1945 he had tearfully described how his brother had "died overseas" while completing a parachute jump in Hollandia, New Guinea. Later, he had gone on to tell that his parents in their grief had sought to replace their hero son, Joseph, by "taking into the family like a son" a cousin, also named Joe.

Toward the conclusion of Gold's direct testimony, we find the following admission:

"Contrary to that story . . . I actually had no wife and two twin children . . . I was a bachelor and had always been one. . . .

"Sometime before I came to work for Abe [Brothman] I had told him that my brother had been killed in action in the South Pacific, and [after the FBI visit of May, 1947] I told Abe that this was not so, that my brother was still alive."

Thus, each and every detail of the above incidents was shown to have been entirely fictitious from start to finish!

In short, Gold had created a completely mythical life, never having paid court to any Helen, never having married any Sarah, never having had a wedding or a honeymoon or children or a house in Abington or anything remotely resembling the family and circumstances he had described so elaborately and so successfully for so many years.

It does appear, however, that he did base his phantasies on two actual women named Helen and Sarah, both of whom, of course, remained entirely unaware of their participation in Gold's imaginary romances. But what is especially revealing is how, at the Brothman trial, Gold confuses his imaginary wife with his mother or, rather, substitutes one for the other:

Q. Did you not say as a result of your being away from home in 1942 and 1943 that Sarah resented your absences — your wife, Sarah?

A. Actually, it was my mother.

And concerning the purchase of the home in Abington and his "wife's" refusal to be transplanted to New York:

"That was partly false but it was based on truth. My mother and I had purchased a home and I didn't want to be transplanted to New York."

But even so the actual facts were considerably different, for it was his father together with his brother who had really purchased the house.

This tendency to substitute himself for his father and brother reached its height with his wishful "killing" of at least one of these rivals, his brother Joseph. Apparently Gold was so guilt-stricken that he had to invent the story of his parents' replacement of their lost son with a cousin of the same name, *which incident was also a complete fabrication.*

At the Brothman trial Gold had ready a glib explanation for all this fabulous deception. It was that he had been assigned to contact Brothman not by Jacob Golos but by a Soviet superior named "Sam," and that it was "Sam" who had instructed him to present himself to Brothman as a family man so that he would appear less "unstable."*

The utter absurdity of the explanation is exposed by its own irrationality: Why should the spy-master "Sam" endanger the safety of his entire operation by instructing his agent to play a complicated fictitious role in addition to his espionage tasks — a role requiring a daily continuity of lies told to numerous people, and a role so easily exposed by the slightest happenstance?

Moreover there was the direct challenge put to Gold by Brothman's attorney as follows: If it was true that he and Brothman had been brother spies "working toward a common end" for so many years then why was it necessary for Gold to continue the elaboration

*In the opinion of a number of psychologists with whom this writer conferred, this explanation reveals how unstable Gold appeared to himself and how desperately he longed to be taken for a virile married man who could produce twins. And yet, as pointed out, it was because of his fundamental inability to enjoy a normal relationship, even in phantasy, that he surrendered both wife and children to an older man, "the elderly, rich real-estate broker."

of the fiction? Why didn't he simply tell Brothman the real reason for the pretense, just as he had once explained the practical reason for using the name Frank Kessler? In reply to this point Gold furnished this lame excuse:

> "I had become so tangled up in this web of lies that it was easier to continue telling an occasional one than to try and straighten the whole hideous mess out."

But then he adds, almost in awe of his own prowess:

> "It is a wonder that steam didn't come out of my ears at times."

In passing, comment might be made on Gold's penchant for pulp-fiction phraseology. Apparently a goodly portion of his reading consisted of mystery stories, detective thrillers and spy tales, because it appears that Gold was in the habit of reading these into all hours of the night.* Here, from the Brothman trial record, are some examples of the purple prose he seems to have absorbed:

> "I knew that inevitably this net that I had gotten meshed in and this house of cards . . . could not stand up."
>
> "I knew that once the FBI began to probe into the hideous snarl that was my life, once they pulled one thread, the whole horrible skein would become untangled. . . ."

In addition he tells us that he always yearned "to brush aside the whole loathsome structure" of his spy career, and from his subsequent testimony at the Rosenberg trial here is this choice morsel concerning one of his early "Soviet superiors":

> "He was tall, about 6 feet 2, had blond hair, and a very determined feature. He walked with a catlike stride almost on the balls of his feet. . . ."†

Returning to the standard definition given by psychiatry to "pseudologia phantastica" or the pathology of abnormal lying, we recall that the impostor achieves through fraud and deception those elements of love and affection which he lacks in real life. The definition continues:

> "The lies are seemingly phantasy wish-fulfillments, not unlike the more or less normal phantasies of children which grow by a two-fold process of elaboration and by the continuous addition of material in the effort to continue the appearance of veracity.

*Pilat, *op. cit.*, pp. 4, 54, 55.
†Record, p. 842.

in a tangled skein – that no possible line can be drawn between what he admits is pure fiction and what he claims is so-help-me-God truth.

And yet at the trial of Brothman, incredible as it may seem, a jury and a judge presumed that they were able to draw such a line. Judge Irving Kaufman showed that he was clearly aware of Gold's special talents when he addressed Brothman's attorney impatiently:

> The Court: . . . The witness [Gold] said he concocted these things from beginning to end. Are you going to take each and every detail he concocted?

How, then, was it possible for Judge Kaufman to extract or pin down the truth in Gold's testimony at any one point? If he was aware that Gold was capable of concocting a mythical family life in every detail for six years *from beginning to end*, how could he know that Gold's espionage life was not also a complete concoction?

Gold was a major witness in the Rosenberg trial, yet what the reader knows at this point concerning Gold's astonishing facility to invent and spin any yarn in the minutest detail was totally unknown to the Rosenberg jury! Let this be clear – not one juror was aware that Gold had proved this facility, based on years of experience in holding a fabrication together among scores of friends, that he displayed a most remarkable ingenuity in juggling discrepancies, covering up loopholes and elaborating "by the continuous addition of material in the effort to continue the appearance of veracity."

Only two men at the Rosenberg trial were in full possession of this highly significant information, the same two who had served as prosecutor and presiding judge at the Brothman trial, namely – U. S. Attorney Saypol and Judge Kaufman.

And let it be stated emphatically that it was largely on the basis of Gold's supporting testimony against the Rosenbergs, which Saypol declared was "the necessary link" in the chain of their guilt, that their conviction was obtained and their sentence of death imposed.

It was the testimony, as Saypol and Kaufman both knew, of a self-admitted pathologic impostor whose only means of gratifying a lifetime of starved emotional needs was in the acting out of a spy career based on nothing more than his "phantasy wish-fulfillments."

iii

In 1947, according to Mr. Hoover, the FBI was well aware of the potential value of Gold as an "accomplished deceiver," because its investigation of him had "developed some highly useful informa-

tion." Exactly what went on between Gold and the FBI until they were ready to produce him as the "American confederate" of Dr. Fuchs we have no way of knowing. But we can examine how his talents were utilized to fabricate a spy biography and we can ask whether or not this new fabrication contained any more truth than the others.

What is the FBI explanation of how Gold became a spy for the Russians? At the outset we learn that the "Tom Black" earlier referred to was the mysterious gentleman most responsible for Gold's downfall. And, whether Black was his true name or not, we find his identity further cloaked by Mr. Hoover describing him in the *Reader's Digest* as:

> ". . . A singular character in Jersey City whom we shall call Troy Niles. . . .
>
> "Niles [Black] was an eccentric individual who liked to coil a pet black snake around his neck and who pitched marbles to a crow that was trained to catch them in flight."

If we are to believe Mr. Hoover, it was this rather grotesque "Communist" who first "captivated" Gold back in 1932. "By precise and insidious techniques," we are told, Gold was soon "softened up" for his spy career. These techniques consisted of his being taken to Greenwich Village "gab-fests composed of Communists, parlor pinks, leftist intelligentsia, and people of that sort."

But while Gold was apparently impressed with Black's charming of crows and snakes, he found the gab-fests "about the drabbest affairs of anything he had ever been to in his life." As for his opinion of Communists, there is his testimony at the Brothman trial:

> "I didn't like them. . . . I thought they were a lot of wacked-up Bohemians."

And so we come upon the unique fact that Gold actually disliked Communists (except, it appears, Tom Black); and to such an extent that membership in the Communist Party was abhorrent to him. Here is his attorney's statement at his sentencing:

> "One time he told me that he thought Communism as a political dogma was no more than the victory of mediocrity in Russia. Let the record in this case show . . . that Harry Gold has never been a Communist and he is not a Communist now, nor was he in those younger days."

If, according to the theory of Mr. Hoover, all adherents to Communism are potential spies and if, as we have seen, Gold was hostile

ii

On the lower East Side of New York, at 64 Sheriff Street, there is a dismal slum tenement. Alongside its entrance is still the small store once occupied by Barnet Greenglass, an immigrant from Russia. Here he eked out an existence repairing used sewing machines for the sweatshops of the ghetto.

Up a flight of creaking wooden stairs above a dark, dank hallway was his cold-water flat, vermin- and rat-ridden. There was no bathroom and what was called the toilet was off in the hall and had to be shared with other tenants. In 1922 his wife, Tessie, who had emigrated from Austria, gave birth to a fourth child, David.

The oldest son, Samuel, was fifteen at the time, then came his sister Ethel who was seven and another brother Bernard who was five. While the mother cooked, went shopping or helped tend the store downstairs, the task of caring for the five-year-old Bernard and her baby brother fell to the little girl.

After finishing public school David attended a trade school to learn to be an auto mechanic. When he w. sixteen he tried to get into a handball tournament at one of the local community centers where many a teen-ager was a member of either the Yipsels (Young People's Socialist League) or the Y.C.L. (Young Communist League).

During this period, around 1938, it was fashionable for many youths on the East Side to belong to one group or another, not so much for political reasons as to be in the social swim for dances, parties and sports. Thus it was that when young Greenglass joined the Y.C.L. handball team because it was the first which happened to have an opening, he unknowingly entered the FBI's "Central Subversive File Checks."

Only a block or so away, on Rivington Street, lived a girl named Ruth Printz, some two years younger than David. Her parents, the father from Hungary and the mother from Poland, owned a small cotton-goods store behind which the family lived.* When Ruth was sixteen and had graduated from high school, she went to work as a typist at $8 per week. As the saying goes, David and Ruth were "serious" about each other, even though he was only eighteen and earning very little at the time. Anxious to have her future husband

*In later years Ruth frequently complained to fellow typists that she had "hated her environment – hated her existence," and had always been ashamed of having to live "back of the store." (From an interview by this writer with one of her fellow-employees.)

amount to something more than an ordinary mechanic, Ruth encouraged him to enroll at Brooklyn Polytechnic High School.

His sister, Ethel, had recently married a young graduate engineer from City College named Julius Rosenberg, and there was no reason why David shouldn't try to be one, too. But whether it was the streak of hard luck which David always felt himself "jinxed" with or sheer lack of aptitude or just too many late dates with Ruth, in his very first semester he failed all eight out of the eight technical courses.* After this painful debacle David resolved he was not cut out for serious study and succeeded in getting himself a better-paying job. In the meantime, Ruth had increased her earnings to $30 a week and the young couple decided their combined income was sufficient for marriage.

On their wedding day, Nov. 29, 1942, David was twenty and his bride eighteen. After living with in-laws for a few weeks they found a cold-water tenement flat at a rental of $18 per month. It was no better and no worse than the slum dwellings of their parents.

Yet hard luck was still at David's heels, for only four months later he was drafted into the Army as a private, classified as an automotive machinist and assigned to a motor and tank pool in Pomona, California, and eventually reassigned to the student machine shop of an installation at Los Alamos, New Mexico.

In November, 1944, Ruth made a five-day visit to David in Albuquerque to celebrate their second wedding anniversary and to explore possibilities for an apartment and a job. Two months later Ruth set up housekeeping in Albuquerque in a one-room kitchenette apartment.

In March, 1946, when David had received his discharge and the couple had returned to New York, Ruth found a flat in another cold-water tenement just across the street from her father's store.

Anticipating David's return to civilian life, his mother had arranged a partnership for him in a small business venture recently formed by Julius and her other son, Bernard. It was called the United Purchasers and Distributors and involved the buying and selling of war-surplus nuts, bolts, wrenches and screw drivers. The total assets were roughly $5,000, and David's investment was $1,000.

In that same year, 1946, a son was born whom they named Stephen. Now there was an additional expense, but the partnership scarcely

*Record, p. 611. (*Note:* A great deal of the Greenglasses' personal background is to be found in their testimony; however, it is too interspersed throughout their direct and cross-examinations to list by specific pagination.)

paid David a living. The business was reorganized as the G. & R. (Greenglass and Rosenberg) Engineering Corporation to do machine work, with David in charge of production, but the new effort fared just as badly. From time to time, even though the partners were on a salary arrangement of share-and-share-alike, David found it necessary to ask Julius for small five- or ten-dollar loans to make ends meet. These out-of-pocket loans eventually totaled $300, but no part of it was ever repaid until David quit the business and a settlement was made in which Julius was credited with this amount.

In 1947 the partnership was again reorganized with the addition of a new and "silent" partner, one Mr. Schein, who invested $15,000 to match the others' assets. The new company was called the Pitt Machine Products and proportionate shares of stock were issued to the various partners. But fortune still eluded them and as the business kept foundering Julius and David began to find increasing fault with each other. It began as mild bickering, but soon there was heated quarreling to such a degree that by 1949 their relations had approached an open family feud.

Ruth, who had always had a tendency to dominate David and had been overprotective of him ever since he was an adolescent, would complain that while her husband did most of the hard and dirty work Julius, the so-called idea man and sales chief, just "handed out orders instead of obtaining any." The latter, in turn, objected that David's machine work was frequently faulty and this caused numerous rejects, resulting in loss of customers.

As business continued to decline the feuding increased. One incident that seemed to injure David's pride deeply happened when Julius appointed another machinist to supervise his brother-in-law's work. As one of the bosses, David resented the humiliation of having "to work under my own employee."

With business slackening to a point where none of the partners could draw any salary at all David would take longer lunch hours at his flat, which was only a few short blocks from the shop. Frequently Ruth would keep him at home to mind the child while she went shopping. On such occasions she would scornfully tell him he was a fool to hurry back and found reasons to send him on errands for her.

Not a little of this was sheer spite, for Ruth had always been intensely jealous of David's "wonderful" sister Ethel whose talents and virtues she resented as fiercely as others admired them. Particularly, she envied Ethel's modern apartment with its steam heat and resented that her own child had to play in a filthy back alley while

Ethel's children had a modern playground.* Whereas she had to lug parcels up three flights of stairs Ethel could blithely step into an elevator and just press a button. On the East Side, to describe someone's social standing in the most awesome terms it was enough to say the lucky one lived in a house which had an elevator.

In her heart too Ruth had always resented the odious comparisons made or implied by members of the family between Julius and David. Ethel had married a college graduate, "a big engineer," whereas all David amounted to was just a machinist. It enraged Ruth whenever the Rosenbergs were reported to have talked disparagingly of David or accused him of loafing. So bitter had the feud become that at the time of David's arrest Ruth had not visited the Rosenbergs for almost eighteen months. It reached its height one day when David had answered Julius' objections to his "goofing off on the job" with an outright threat to "knock his block off."

In August, 1949, David finally quit trying to be a businessman and took a job paying a steady wage with the Arma Corporation in Brooklyn. Bernard, for some time burdened with a wife dying of Hodgkin's disease and a two-year-old daughter, also left and took a job with a silk house. Julius, however, decided to carry on the remnants of the business and undertook to pay off the various partners for their stock. But enmity still remained, for Julius had to make a down payment to Mr. Schein of $1,000 on a settlement of $5,500, and therefore had nothing left to pay Bernard or David.

Knowing that Julius had cashed in his last Defense Savings Bond and was living on borrowed money from relatives, Bernard agreed to wait. But David and Ruth demanded immediate payment. When in May, 1950, only a few weeks before David's arrest, Julius asked for the transfer of stock Ruth refused to permit it unless he first signed a number of promissory notes. Since these would have obligated him to pay off the debt in monthly installments Julius refused, replying he could not possibly meet such a series of notes. This incident served to further intensify the feud — so much so that even after David's accusations had resulted in Julius' arrest and even as Ethel was desperately trying to pay grocery bills for herself and her children before her own arrest, Ruth instructed her attorney to institute suit against them for the $1,000 still unpaid.†

*These attitudes of Ruth Greenglass were related to this writer by neighbors and former friends on the East Side.

†In the light of the subsequent Greenglass testimony that they had received $5,000 of "Russian money" from the Rosenbergs for "flight," it would seem that the $5,000 was just too imaginary for Ruth to forget the *real* $1,000.

iii

Earlier that same year the nervous strain of the Greenglasses had been heightened by two serious incidents. At the beginning of February, only a few days after the arrest of Dr. Fuchs, an FBI man had appeared at their flat to question David about a "specimen of uranium" he was suspected of having stolen from Los Alamos.

In addition David had engaged in considerable black market activities in Albuquerque, selling precision tools and other stolen Army materials. There is no way of knowing what took place between the Greenglasses and the FBI following this February inquiry, but it is known that the Greenglasses felt themselves to be "the object of persecution" by the FBI. It is also known that David had actually stolen such "a sample of uranium," and that, terrified by the FBI visit coming so close upon the arrest of the "Communist" spy, Dr. Fuchs, and by the emphasis placed upon his youthful Y.C.L. membership, "he had thrown this uranium into the East River."*

On top of all this suspicion of atomic espionage and youthful Communism, coupled with the threat of imprisonment on several counts for his Army thefts, an almost fatal accident occurred. For, on February 14, Ruth was almost burned to death when her nightgown caught fire at their only heating source, the gas stove. David managed to extinguish the flames but Ruth was burned so badly she had to be rushed to the hospital for emergency blood transfusions.

At this time she was six months pregnant and was forced to leave her three-year-old boy in the care of relatives for two months until she recovered sufficiently to return home in mid-April. Life had become a rat race for the Greenglasses and it is little wonder that much of their venom was poured out on the hapless Rosenbergs. Heavy with child in her ninth month, her burns still not completely healed, Ruth tried to keep up with the housework as well as with David's tensions.

On May 16 Ruth was taken to the maternity hospital to give birth to a daughter, Barbara. No sooner had she returned to resume housework and tend her newborn infant than she developed a serious infection from her February burns. High fever resulted and again she

*These facts concerning the theft and disposal of the uranium, suppressed by the prosecution during the trial, were later revealed by the confidential inter-office memos of O. John Rogge, the Greenglass attorney, in reporting his conference with Ruth Greenglass, as well as by an affidavit of Bernard Greenglass. (*Note:* See further references to the discovery of these memos in Section v this chapter.)

When Julius reached school age and was enrolled at Public School 88 he entered the Downtown Talmud Torah at the same time. Here he studied Hebrew and Biblical philosophy, and was graduated with highest honors.

Yet he was not altogether the Bible student: among his boyhood books his mother still treasures are Horatio Alger's *Phil the Fiddler* and Edgar Rice Burroughs' *The Chessmen of Mars.* There were also *The Motor Boys Under the Sea* and *Tom Swift and His Electric Runabout.* And on the streets of the East Side Julius proved no more saintly than any other kid on the block. "When some boy would pick a fight, my Julie would fight him," his mother readily concedes, "but he'd never tell who the other boy was. So I stopped asking."

Passover was the high holiday Julius loved best, for it commemorated the release of Israel from bondage. After the 3,500-year-old question each Jewish lad asks his father, "Why is this night different from all other nights?" there were the songs, the good food and the game of who could first find the piece of unleavened bread hidden by the father. "My brother loved to laugh, everyone loved his company," his sister recalls.

Julius' former Hebrew teacher never forgot him: "Julie left a very deep mark . . . the finest of Hebrew scholars. . . . In our school, our teachers were free. We spoke as we honestly believed. . . . When I taught the Prophets, it was not just to speak of what happened thousands of years ago, but what was happening around us. A strike was in progress at Ohrbach's. I spoke of it in connection with a chapter in Isaiah: 'For ye have eaten up the vineyard; the spoil of the poor is in your houses.' "

While in his senior year at Seward High Julius had been elected vice president of the Young Men's Synagogue Organization. On Sundays the fifteen-year-old vice president found it necessary to earn pocket money by peddling penny candy. Sometimes, he recalled, "the profit went from a low of forty cents up to eighty cents for a good day."

> *"I remember when my father, a garment worker, was in a long strike against sweatshop conditions. Because he was a shop chairman and an active unionist, my father was blacklisted. . . . We lived in the midst of the great depression. . . ."*

It was 1933, the year of farm foreclosures, breadlines, soup kitchens and Hoovervilles. It was the year when Hitler came to power and Roosevelt endeavored to put 14,000,000 unemployed back to work. In the beginning of that year Hermann Goering had his Storm Troopers set fire to the Reichstag (Parliament), but cast the "blame

upon the Communists," as the first step toward "proscribing all political parties . . . beginning with the Socialist Democratic Party." And by the end of that year systematic anti-Semitism was well under way with the reduction by law of "the percentage of Jews in Government life, in industry and in the professions."* And in 1933, in San Quentin Penitentiary, a trade unionist was serving the sixteenth year of a life sentence.

"One day I stopped to listen to a speaker at a street corner meeting. . . . His topic was to win freedom for Tom Mooney, labor leader who was imprisoned on a frame-up.

"That night I was reading a pamphlet I bought from the speaker giving the facts of this case and the next day I went and contributed 50 cents. Then I began to distribute the pamphlets and collect signatures on a Mooney petition from school friends and neighbors. . . ."

Some six years later, after twenty-two years of imprisonment, a "full and unconditional pardon" was granted by Governor Culbert Olsen, stating unequivocally: "Thomas J. Mooney is wholly innocent . . . his conviction was based wholly on perjured testimony presented by representatives of the State of California."

"At school, I took a very active part in the campaign to free the Scottsboro Boys. . . ."

In the year 1933 another frame-up came to national attention. It was that of the nine Negro boys sentenced to death in Scottsboro, Alabama. Two had been only thirteen and fourteen years old when arrested. Their conviction, too, had been based on perjured testimony, most of it from a self-admitted prostitute with a known police record. But in those years there had been a different climate of public opinion, and the United States Supreme Court reflected it by ordering the benighted state of Alabama to grant new trials.

By 1934, when Julius entered the College of the City of New York to study engineering, Mussolini had commenced his armed attacks on Ethiopia. Then came the occupation of the Rhineland, then the war upon Spain and the Japanese onslaught on China; soon were to follow Austria and Czechoslovakia. And while business went on "as usual" between the Rome-Berlin-Tokyo Axis and the Western democracies, in American colleges the American Student Union was

**Information Please Almanac*, John Kieran (ed.), Macmillan, New York, 1951. *The World Almanac*, Harry Hansen (ed.), World-Telegram, New York, 1950.

the only organization that spoke out against the coming world blood bath.

Some fifteen years later, at Julius' trial, activity in this organization constituted the crime of "premature anti-Fascism," and membership in the City College chapter was offered as proof of his inclination toward "treasonable activities." In his published letters Julius relates this incident in his freshman year:

> ". . . The president of the college . . . invited a delegation of foreign students from fascist Italy to be guests and help make good will for that regime among us students.
>
> "When the prexy got up to speak he was greeted by a chorus of boos. He was forced to sit down without being able to speak, though he managed to state that our 'conduct was befitting guttersnipes!'
>
> "To re-establish order they allowed Eddie Alexander, president of the council, to take the rostrum. The hall was perfectly quiet when he began: 'I was given permission to speak if I don't say anything derogatory against fascism, but I want to convey a message to our enslaved and tricked brothers under Italian fascism.'
>
> "The truth cut too deep and the Fascisti students dragged him away from the microphone and a free-for-all began. Three thousand voices thundered in the Great Hall: 'Abbasso il fascismo!' [Down with fascism!]
>
> "At this point the prexy called in New York City's finest [N.Y.C. police] and the college student body was treated to a lesson in nightstick civics.
>
> "Within a week almost the entire student body was wearing buttons that read: 'I am a guttersnipe. I hate fascism.' Subsequent events such as Il Duce's bringing 'civilization' to Ethiopia via bombs, flames and death, proved we were correct. But 21 students were expelled."

Such were the political highlights in Julius' recollection of his adolescence. However, his other interests were not different from those of any other college freshman. At this period Julius lived in a housing development called the Lavanburg Homes. Each Friday night there were cultural lectures which Julius attended, frequently double-dating with other boys and girls of his own age. There were also plays put on by the Lavanburg Players and often there would be special occasions when actors and directors from the Group Theatre uptown would present stimulating evenings of discussion.

Then, of course, there were Sunday hikes and outings on the Palisades, and on summer evenings good music at the C.C.N.Y. Stadium. On Saturday nights there was always a dance given at one or another of the Settlement houses, and here, too, Julius would double-date and complete the evening with the usual "chow mein" supper in nearby "Chinatown."

When he was eighteen, Julius was a tall, slim and good-looking boy. It was Christmas week of 1936, and he was invited to a party on the East Side. One of the girls there sang the famous aria "One Fine Day" from Madame Butterfly and, as an encore, Gounod's "Ave Maria." She was a petite girl with soft, dark brown hair, a shy smile and a most expressive face, one which Julius' mother would describe as a "malach's ponim" – the face of an angel.

Her name was Ethel Greenglass, and, although she was two years his senior, he felt himself a good deal older and more experienced. He was very proud when she later confided that he was actually her first "boy friend." When he learned that Ethel had often participated in the rehearsals of the Lavanburg Players and attended the Group Theatre lectures right in the same building where he lived, he was astonished that they had never "bumped" into each other, at least in passing. Almost from the moment they met they were inseparable. As one of Julius' friends relates, "Julie practically never left her side."

On June 18, 1939, Julius and Ethel became man and wife in an orthodox ceremony performed by Rabbi Zin. The young husband had graduated from college only four months before and had obtained a temporary job as a tool designer. And while Ethel continued her work as a secretary, they made their home in a rented bedroom of a Brooklyn apartment belonging to some good friends.

In the interim Julius had passed his government examinations and received his post as Junior Engineer, his work consisting of the inspection of electronic equipment manufactured for the Signal Corps.

By 1942, when he had been promoted to Assistant Engineer at a salary of $50 per week, the Rosenbergs felt affluent enough to apply for an apartment in the new housing development on Monroe Street. It was only three rooms, kitchen, living room, bedroom and bath, but it was a palace compared to anything they had ever lived in before and the rent was reasonable.

From a friendly couple who were moving to California, they borrowed the essentials: a bed, a maple table and a bookcase. Another friend offered them a breakfront unsuited to his own apartment and Julius managed to have it carted over for five dollars. There was an

advertisement in the housing development's gazette, the *Knickerbocker News,* of a second-hand piano for sale at $25, and Ethel made the purchase.

In the year 1943 their first son was born and named Michael Allan. Ever since Pearl Harbor, Ethel had served as a Civil Defense worker and had also rendered considerable community service for the Henry Street Settlement. With her first baby, however, there was little time for more than her housework, what with cooking, cleaning and doing the laundry.

Frequently Julius, as Civil Service Chairman of his union, would stay up late working over grievance appeals. Sometimes a neighbor would drop in and ask them to contribute to the Joint Anti-Fascist Refugee Committee, then concerned with aiding the forgotten victims of Franco. Once, they were asked to circulate a coin-collection can labeled, "Save a Spanish Republican Child." However, Ethel, finding her time too limited, instead contributed a dollar, and kept the little can on an open shelf as a hint to their friends to do likewise.*

In the autumn of 1944 Ethel became quite ill and was bedridden for many months. It was due to a weak back from which she had suffered since childhood. All during this period, since Michael was still a baby, Ethel had a woman come in to help.

It was in February, 1945, that Julius was brought up on FBI charges before the Signal Corps "that he was a member of the Communist Party." In reply, Julius firmly denied in a written statement that he was or had ever been a member of the Communist Party.†

Despite this denial and despite all efforts at reinstatement, Julius was dismissed without a hearing and he was forced to look for another job. He found one within a short time at the Emerson Radio Company, where he worked for somewhat less than a year at a salary of $70 to $77 a week.

Early in 1946 Julius' father died. A year later, when a second son was born to the Rosenbergs, he was named Robert Harry "in beloved memory." Recalling his family life while in the death house, Julius wrote to his wife nostalgically:

> "Do you remember the procession when it came time for the little one to be put to bed? You led the way holding his feet, I held his shoulders and Michael marched in the middle with his brother's back resting on his head. It was loads of fun...."

*During the trial this coin-collection can became Government Exhibit 27, and was introduced as "documentary evidence" to prove the Rosenbergs' inclination and potential for espionage. (Record, pp. 1176-1177.)

†Record, p. 1185.

"I've been thinking, darling, it is almost three years since we've lived with our children. How we treasured every moment with them and how wonderful it was to share each and every accomplishment of theirs. A new painting, a nice block building, a particularly meaningful action of our boys, signs of growth, indications of abilities for music, art and the general problems of joy, worry and pain that go with the beauty of family life . . ."

In the spring of 1946 Julius left the employ of Emerson Radio to enter a partnership with his two brothers-in-law, Bernard and David Greenglass, the latter recently discharged from the Army. Twice the failing business was reorganized, and, as has been recounted earlier, after 1949 the Greenglass brothers left Julius to carry on alone.

With his absentee partner, Mr. Schein, Julius had negotiated for the transfer of stock. It took his last Savings Bond, plus scraped-up loans from his family, to make the $1,000 down payment, and he still had to pay off the $4,500 balance to Mr. Schein in installments of $160 per month.

Concerning the $1,000 he had agreed to pay David for his share of stock, it seemed to Julius that the Greenglasses ought to be more patient and more considerate, instead of plaguing him for promissory notes which they knew very well he could not pay in the near future.

iii

"Somewhere in the long ago I had a normal life with a sweet wife and two fine children and now all is gone and we are facing death. . . ."

Following the highlights of his own background, the FBI men questioned Julius about the education and work background of David Greenglass. After that, they asked him to focus his attention on the dates on which David had come home on furlough back in 1945. Didn't he have a talk with David on or about January 5, in that year? Yes, he could remember inviting the Greenglasses for dinner, just as all the family had done, but that was more than five years ago, and what exact day it had taken place he could not recall. There was more of this line of questioning, when suddenly one of the detectives tossed at him:

"Do you know that your brother-in-law said you told him to supply information for Russia?"

official FBI release, announcing the arrest of a "Russian-born" physicist in California:

"FBI ARRESTS SCIENTIST AS RED"

The scientist was a Dr. Sidney Weinbaum and the char es were "that he had concealed membership in the Communist Party." It was evident to anyone why the FBI had "timed" these two arrests for the same day. Here were the perfect stereotyped requirements for the scapegoats of 1950: "Russian-born," "scientist," "Red," "Y.C.L. member," "A-secrets passed," all coupled together with the Jewish names "Weinbaum," "Greenglass" and "Gold." It made a rather neat package, and a frightening one, for every paper contained the ominous phrase:

"Greenglass, if convicted, faces a maximum penalty of death."

At the law office of his union attorneys Julius was advised to secure the help of counsel with wider experience in civil liberties cases. The name of a well known liberal attorney was recommended. His name was Emanuel H. Bloch. His office was on lower Broadway but it was too late to reach him that afternoon. Julius was advised to try him at home later that evening.

iv

It was the most casual first meeting for two men whose names were one day to ring around the world as symbols of unyielding courage in the face of all conceivable odds.

At his apartment that night, Emanuel Bloch was entertaining some friends. When the call came from Julius, rather than intrude his business upon his guests, he suggested that they meet each other at the nearest subway station. This was at Sixth Avenue and Eighth Street, a short distance from Bloch's apartment off lower Fifth Avenue. Both agreed that since the night was warm it might be more agreeable talking the matter over while taking a walk. They recognized each other easily from their self descriptions: Julius' glasses, mustache and gray suit, and the older man's iron-gray hair.

Emanuel Bloch's first impression of Julius was that of "a rather soft, sweet, intellectual sort of fellow," and his first reaction to what had happened that day was that it would be "just another routine" Fifth Amendment case. It seemed to him, in view of Julius' past persecution by the FBI (their unproved accusations to the Signal Corps that he had been a party member), that they were now en-

from the bedroom into the kitchen — from the kitchen into the living room — when, suddenly, she realized that Julius was no longer there.

She ran out into the hallway, but the whine of the descending elevator told her it was too late. She started back to look up Mr. Bloch's telephone number, then as quickly stopped herself; they might interfere. She tried a neighbor's door. Breathlessly, she asked her neighbor to please go and watch the children while she telephoned....

vii

Fortunately, as Emanuel Bloch related the events to this writer, he was at home when the call came from Ethel Rosenberg. He told her he would hurry down to the Federal Building at once, but that the arraignment might not take place for an hour or two. In any case, suppose she called him at his apartment about midnight. In the meantime, to try to calm down — no sense becoming hysterical — it certainly wouldn't help her husband or the children. Ethel promised....

Hanging up, his ear caught the 9 P.M. news broadcast which his wife was listening to in the adjoining room. It was a special announcement from Washington made jointly by Attorney General J. Howard McGrath and FBI Director J. Edgar Hoover:

...Today, the FBI had seized one Julius Rosenberg "as another important link in the Soviet espionage apparatus." According to Mr. Hoover, Rosenberg had recruited his brother-in-law, David Greenglass, to steal "atomic data," and for some years had made himself "available to Soviet espionage agents" so that he could do "the work he was fated for..."

It was instantly clear to Mr. Bloch that the announcement had been carefully "timed" at the FBI's Washington headquarters and had been released to the wire services to synchronize with the arrest taking place only a few minutes before.

When he arrived at the U. S. Courthouse he saw additional evidence of the "timing." Reporters and photographers had been stationed on the steps so that they might photograph Julius' arrival in handcuffs. Usually there would be only a U. S. Commissioner available for such late arraignments. This time, it turned out to be no less than Federal Judge John F. X. McGohey, who swiftly set the bail at $100,000. It was, of course, a prohibitive one, and therefore tantamount to no bail at all.* Mr. Bloch tried his utmost to point this out, but it was useless.

*Article VIII of the Bill of Rights: "Excessive bail shall not be required..."

To be sure, there was her mother (Tessie Greenglass), but when Ethel had called upon her for help, not once had she responded; not even to mind the children. It was her mother's stubborn opinion that David was in trouble mostly because of Julius' and Ethel's "Communistic" ideas.

Thus, added to Ethel's burden of grief was the agonizing knowledge that she could not even turn to her own mother for simple comforting. What was particularly galling was the extent of the rapport between her mother and Ruth, now her avowed mortal enemy.

In subsequent talks with Mr. Bloch this theme became one that quite obsessed her. Despite the difference in age between Ruth and Tessie, Ethel saw their basic personalities as astonishingly similar. Both women were egocentric; both had become calloused by poverty and suffering. The struggle for existence on the East Side frequently dehumanized people. While some emerged unscathed, others became warped. Some became sensitive and compassionate, and these would ask why there need be such poverty and suffering in a land of plenty. Others became embittered and selfish and let their suffering harden into a self-protective armor.

During these conversations with her attorney Ethel appeared to be equally concerned with the psychological reasons for her brother's apparent hatred of Julius. David had been about fourteen when she had met Julius and she remembered that he had not taken too well to her first boy friend. She remembered how glumly he had reacted to Julius' courtship and the testy remarks he had often made about the typing she did for him in the kitchen and their staying up so late. . . .

ii

It was a very cold winter the year Ethel Greenglass met Julius Rosenberg and the two would sit close to the kitchen stove to keep warm. With his long legs outstretched beneath the stove, Julius would write out his college reports while Ethel typed them out neatly. One winter, she told him, it had been so cold in her house that when her girl friends dropped over they would thaw out their feet by placing them directly inside the oven.*

At first she had been almost ashamed to ask him over because of the neighborhood. In the evenings when he walked her home the street was jammed with weary peddlers returning their pushcarts to

*Op. cit.; many of the following details regarding Ethel's girlhood were compiled by Virginia Gardner in interviews with former friends.

the stables just across from her father's shop. In summer there was an awful stench from the discarded, rotting fruits and vegetables. Nearby, too, were the live chicken markets where the truckers unloaded the crates of squawking fowl. Then there was the cluttered junk in her father's sewing-machine repair shop at the very entrance to the house.

She remembered that her father had taken to Julius right from the beginning. She had always adored her father, particularly for his good nature and high spirits which seemed to find expression even in his merry "high red cheeks." No matter how busy he was, he never seemed to mind the kids running in and out to ask for a penny to buy candy or when they played hide-and-seek amongst the junk.* Unfortunately her mother was totally lacking in such warmth, not only to her girl friends but to her one and only boy friend.

The rooms the Greenglass family lived in behind the shop were almost as cheerless as her mother's usual grunt of welcome to her friends. First there was the dark, windowless bedroom in which her parents slept, then came the kitchen where the stove was and behind this was the unheated dining room which faced the usual back alley. Upstairs, there were the three bedrooms for Ethel and her brothers. Ethel's faced the street; her brothers Sam, Bernie and David shared the two back rooms.

Sometimes up in her room Ethel would play the piano and sing for Julius songs like "Ciribiribin," and also show proudly that she could hit high C.† But when she returned from the hallway below after kissing Julius good night she would meet with David's dark looks. Not realizing that her teen-aged brother might be secretly jealous, she would laughingly apologize for playing the piano so late.

It had never occurred to her that David might have resented those good-night kisses and whatever else he imagined took place between the young lovers. Later, she wondered whether it was this repressed rivalry or guilt that was the underlying cause for all those difficult years in Julius' and David's partnership.‡ It would not be surprising,

*Ethel's father, Barnet Greenglass, died in 1948.

†Despite her mother's opposition, Ethel had saved up enough to buy out of her overtime pay an old piano on which to practice her singing lessons. During this period, she worked for the National New York Packing & Shipping Company. Her voice had genuine quality, and while still in her teens she became the youngest member of the Schola Cantorum at the Metropolitan. She also attended classes in drama and modern dancing at the famous Henry Street Settlement House. (Record, pp. 1305-1306.)

‡According to David's testimony at the trial, there were "quarrels of every type and kind . . . arguments over personality . . . over money . . . over the way the shop was run . . . over the way the outside was run." (Record, p. 661.)

When she was excused she wondered why they had called her at all. Even the Grand Jury members appeared to be puzzled, she recalled. It is safe to venture that none of them realized they had been used only as a decoy.

It was exactly 1:15 P.M. when Ethel left the Federal Building. Suddenly there were two men at her side. One of them took her arm and said, "You'll have to come with us — you're under arrest." They had no warrant; they said they didn't require one. Then they took her right back into the same building and up to the FBI suite on the 29th floor. (Later she commented bitterly to her attorney about the ceremonial hypocrisy. Why hadn't they simply arrested her when she came out of the Grand Jury room? And if that was illegal, was it any less so to arrest her without a warrant after bringing her there under the false pretense of a subpoena?)

While she waited for the United States Commissioner to return from lunch she was permitted to call her attorney. Since Emanuel Bloch was out of town his secretary quickly got in touch with his father, Alexander Bloch. It was the first time Ethel met the seventy-year-old lawyer whom she later came to love as dearly as a father. She was also permitted to telephone her neighbor to explain what was keeping her. After warning her neighbor not to show alarm in front of the boys, Ethel asked to speak to Michael. In her half-numbed state she had no idea how to break the news to the boy. There was no sense lying; he would hear it on the radio soon enough. She tried to keep her voice even and relaxed:

"Michael, do you remember what happened to Daddy? Well, dear —"

It was as far as she got, for the boy instantly guessed all the rest. There was a "long agonized scream" of utter despair. For the next three years, whether tossing in restless sleep in her cell in the Women's House of Detention or in the death cell in Sing Sing, Ethel Rosenberg was to hear again and again that long, despairing scream of her first-born.

The arraignment took place at 4 o'clock that afternoon before Commissioner Edward W. McDonald. As Mr. Lane presented the complaint Ethel heard that she was:

> ". . . accused of assisting her husband, Julius, 32, and others, in recruiting her brother, David Greenglass, 28, to obtain . . . secret information concerning the atomic bomb for the Soviet Union."*

*New York *Times*, Aug. 12, 1950.

The shameful climax of this policy of coercion was reached in the last moments of the Rosenbergs' lives when a telephone line was kept open to the Attorney General's office and the United States Marshal stood by with instructions to stop the execution in the event the Rosenbergs might "break." Thus, from the day of her arrest to the bitter end, when Ethel was kept to the last, there was the Government's "idée fixe" that the way to wrest from the husband his "cooperation" was through what was being done to his wife; and the way to wring from the wife the cry "Enough!" was through her excruciating longing for her children.

vii

In the speech of O. John Rogge requesting Judge Kaufman to give David Greenglass a "pat on the back" by limiting his sentence to a three-year term (which, with parole, would be only one year), he repeated the perjured claims of his clients that they had "almost from the outset" stated to the Government: "I will tell you what happened." It was on the basis of this perjury that the widespread misconception arose that David Greenglass had accused his sister truthfully and voluntarily.

In this chapter, as well as in the previous one, we have seen the proof of this perjury, namely, that his agreement to involve Ethel was obtained by a step-by-step process of threats, promises and rewards — of renewed threats and cynical promises which were never intended to be kept, and of rewards that were held forth like the grapes of Tantalus, when and if he "delivered the goods" at the trial.

In closing this chapter, it is appropriate to ask, what *in essence* was the Government's case against the Rosenbergs? At the trial itself, we will see that it depended chiefly on the testimony of the Greenglasses:

> "Doubtless, if that testimony were disregarded, the conviction could not stand."*

Hence, it was simply the word of two people declaring that two other people were spies, and testifying to certain conspiratorial conversations which *no other person* had ever heard or witnessed. Throughout the entire trial, as we shall see, no substantiation of the Greenglass testimony with regard to the Rosenbergs was ever produced by the Government.

From the very start of the case Saypol realized the need for additional witnesses. In an effort to find them, his confidential assistant,

*From the opinion of the Court of Appeals. (Record, p. 1618.)

similar name: Helene. In March, 1945, Max was asked by Morton to be best man at his wedding.

For the next two years the Sobells lived in Schenectady. In 1947 Sobell received an offer to work at the Reeves Instrument Corporation in New York City. Early in 1948 they found a reasonably priced house out in Flushing, which they bought at a cost of $13,500, having put up their savings of $4,500 as a down payment.

In the meanti ne, back in Washington, Elitcher also wanted to make a change, but for different reasons. In 1947, in order to retain his job with the Navy, Elitcher signed a non-Communist loyalty oath and with it committed perjury. In that same year the "political atmosphere" in Washington, as Elitcher later testified, was such that he became "fearful" of arrest and imprisonment on charges of perjury.

At the same time, according to his testimony, certain marital troubles had developed between himself and his wife so that they "found it difficult to live with each other." Whether or not these difficulties were put to further strain by Max's increasing fear of arrest, his neurotic state became such that "upon [his wife's] insistence" he followed her into psychiatric treatment.

In 1948 Elitcher learned that the FBI had questioned his mother in New York and, with the political climate worsening, his fears became so great that even his psychiatrist could not assuage them. The following is an example of his state of mind admitted under cross-examination:

> Q. You were scared to death at that time, were you not?
> A. [Elitcher]: Yes.
> Q. You have been scared to death ever since, have you not?
> A. Yes.
> Q. Talk up. Let these people hear you.
> A. Yes.*

After he had definitely decided to make a change, Elitcher sounded out Sobell about prospects of a job at Reeves. Assured that he would be promptly employed, he took a two-week vacation in July and drove to New York to spend it with the Sobells while he and his wife looked about for a permanent home.

While driving up from Washington, Elitcher "found a suspicion taking shape in his mind" that he was being followed by some cars

*Record, p. 361.

which he presumed contained FBI agents. So magnified were his fears that he was convinced they were following him all the way to New York!

On arrival, when Elitcher mentioned the possibility of the FBI's surveillance, Sobell laughed it off, refusing to take seriously the idea that two carloads of FBI detectives would spend their time following someone for 250 miles from Washington to New York merely because they suspected him of having signed a false loyalty oath. Certainly, it was Sobell's opinion, if they wanted to investigate anyone's political associations they could do so more easily by making the usual inquiries and obtaining reports from informants.

It was this visit which subsequently became the basis for the celebrated cloak-and-dagger automobile ride to a rendezvous with Julius Rosenberg, possibly the most damaging portion of Elitcher's testimony. When we come to its analysis we will see another instance of how an actual incident of a friend's hospitality was elaborated into an act of conspiracy. Parenthetically, it may be mentioned that while Elitcher included in this tale his fear that he had been followed by the FBI, he managed to project it on Sobell, to such an extent that it became the latter who had been panic-stricken instead of himself.

In October, 1948, Elitcher started work at Reeves in New York and, soon after, purchased a house on 72nd Avenue. This was just around the corner from that of the Sobells on 73rd Avenue. The two houses were almost identical and also "back-to-back," with their rear yards abutting. Each morning the two friends rode to work together "in a sort of car pool," using each other's car alternately.

By way of a passing comment, it seems almost inconceivable that Sobell and Elitcher, as members of the same spy ring, would have entered into so close an association at this time, considering Max's admitted fears that he was still under FBI investigation. It would seem unreasonable, too, even if Sobell failed to discourage the association, that Julius Rosenberg, their "superior," would not have voiced the strongest objections.

•

In the beginning the two couples got along well enough. They had purchased a washing machine together and the two young women enjoyed the chance to chat while doing their laundry. In the evenings they would drop in at either house without worrying about a sitter, for they could see their children's bedrooms right across the back fence.

In June, 1949, Helen Sobell gave birth to a son, Mark. A few

months later the Elitchers had their second child, a boy they named Anthony.

Thereafter, the two couples found themselves gradually drifting apart. In addition to his teaching at Polytechnic Institute, Sobell was also taking graduate work at New York University.

In the meantime, too, a sharp personality clash had developed, oddly enough, between Helene Elitcher and Morton Sobell. She would frequently become incensed at him for criticizing her – for example, at her choice of Venetian blinds when she was fixing up the house. At such times, she would ask him to "stop meddling in my affairs." To Helen Sobell, she would later apologize for having lost her temper, but after all – Morton should try to realize his lack of tact sometimes.

The truth was that Sobell did have this fault and, while Elitcher was used to it, Helene found it "horrible." It is possible, too, that it was equated in her mind with inevitable comparisons between the two men, and the score was not a little unfavorable toward her husband. For whereas Morton had had the courage to quit his job with the Navy and qualify himself for more advanced work, Max had been too timorous to give up his steady job and rating. As a result, Morton was not only earning considerably more than Max and doing more important work at Reeves, but was apparently equipped to become a distinguished man in the world of science some day.

Finally, the rift became widened when it appeared to the Sobells that the Elitchers, unable to face up to the changing political scene, were conforming to it. Despite the crucial questions of the day, they began to show ever decreasing interest in what had previously stimulated their friendship. Whenever the Sobells would mention the gathering storm clouds of war or the political repression increasing day by day, the Elitchers would react uncomfortably. Subsequently, the Sobells confined their conversation to safer subjects such as the children and the condition of their respective lawns. Indeed, by 1950, the two couples had become almost like polite neighbors – no warmer, no cooler to each other than any other neighbor on the street.

Throughout this period, however, from mutual friends, the Sobells heard some unpleasant speculations that Max may have gone voluntarily to the FBI to give them the names of former "comrades," thereby hoping to stave off prosecution on his perjured oath. Morton simply could not believe this of Max and firmly rejected such speculations as contributing to the ever-widening atmosphere of suspicion and distrust.

for the moment of execution is in itself an event as tragic as it is rare, and is such as to arouse instinctively a sense of horror.

"When, then, two children, Michael, 9 years old and Robert 5, are involved in this tearful fate, many hearts can be melted. . . .

"No one can deny how this circumstance at least gives reason to the heartfelt insistence of the mothers who wanted to bring their agonized pleas to the Vicar of Him who dearly loved children."*

•

From the day of her arrest to shortly before trial, a period of some eight months, Ethel Rosenberg was able to see her husband on only three occasions. These occurred when they were picked up at their separate prisons and brought to the Federal Building to be indicted. Aside from these brief public occasions, their only means of communication was through their letters or oral messages delivered by their attorney.

From these letters, from interviews with Emanuel Bloch, and from the previously mentioned research done by Virginia Gardner among former cellmates of the Rosenbergs, it is possible to report some of their reactions to their surroundings, to their separation from each other and their children, and to the political setting in which their case was framed.

". . . Sweetheart, we must go on pouring out all that we feel towards each other in our letters. How frustrating it is, though, to have only this means of communication."

They were permitted only one letter each week, but it seemed to Ethel that whenever she became most depressed a letter from Julius would arrive just in time to give her a lift. What helped, too, were the Jewish religious services which she found "all too short." At the Protestant, Catholic and Christian Science services, which she also attended, she was invited to sing the hymns and, after this became known, there were repeated "requests" from the women all along her corridor. The tedium was helped also by the daily hour of exercise up on the roof, playing "games of catch."

Always, however, there was the long night. Then it was "lights out by 9:00 P.M." and she would toss restlessly on her cot with thoughts

*"The Significance of an Intervention," a front-page article in the *L'Osservatore Romano* (April 16, 1953), the official newspaper of the Vatican, elaborating upon Pope Pius' suppressed appeal that clemency be granted the Rosenbergs. (*Note:* At the time of the Rosenbergs' arrest, Michael and Robert were 3 and 7 years old.)

parents generally "thirsted for education" for their children. Perhaps her mother would not have minded it so much in one of the boys, but in a daughter she found it unseemly. Perhaps, also, because her daughter happened to be the favorite of her husband.

When Ethel's girl friend Rhina would call up to ask for her, she would frequently hear this lament from Tessie Greenglass:

> "Where is Ettie? Where do you suppose she is? Out singing somewhere in New Jersey. I don't understand why she don't go out and get a job."

To another girl friend, Laura, Mrs. Greenglass always appeared as "a bitter woman, whose affection, such as it was, all went to the boys in the family." When Ethel began to save for the purchase of a second-hand piano, her mother had tried to discourage her: If God had meant them to have a piano, he would have provided for it. Since this hadn't been done, it was flaunting the wishes of the Almighty. . . .

Another friend, Kate, recalled that Ethel's family could never understand her complete disregard for money. They seemed to be "rooted in the Ghetto, spiritually impoverished." One had almost the impression that they resented Ethel's talents as emphasizing their own barrenness. And possibly it was this very imbalance which helped create Ethel's self-imposed burden of obligation. Indeed, it was so heavy that it weighed her down even after her mother's monstrous demand when finally she came to visit her daughter.

In the visitors' room of the Women's House of Detention there is an individual stall, so that each prisoner is separated from the visitor by thick plate glass. Conversation is by means of an obsolete telephone apparatus through which one speaks while the other listens. As a result, when the room is full, there is quite a clamor. Some find it less troublesome to write notes which they hold up and read through the glass.

However, when Tessie Greenglass arrived, Ethel found that by some strange "magic" a "table visit" had been arranged in a private room. Unable at first to understand why such special treatment had been accorded them, she soon guessed the reason. Almost immediately after their embrace her mother began to belabor her:

> "What are you doing to Davy? You have it in your power to save Davy!"

Realizing what her mother was implying, Ethel stared speechless. She wanted to scream: "What is Davy doing to us?" But she remained frozen; every bone in her was chilled to the marrow. Her mother was asking her to confirm her brother's accusations!

She sank down into a chair as her mother continued to rail at her stupidity for defying those in absolute power. In the old country, when the Cossacks had started pogroms, a good Jewish daughter and her man hid themselves until the fury was spent. The foolhardy ones, the "Zionisten," the "Socialisten," who tried to fight back, were crippled and slaughtered. If during the rampage a Jew chanced to be trapped, the wise one would give the hoodlums all the wine and schnapps in the house, hoping to get them into a stupor. He would even let them pull out his beard and dance for them — anything to ward off catastrophe — anything . . . !

There was nothing Ethel could reply: she just sat there in dull misery waiting for the matron to call time. When she reported this incident to Mr. Bloch it was some days later, but she still appeared like a stricken person.*

iii

"So many prisons, such a world of unending misery to have set foot upon, institutions for the damned; innocence was no protection in that world."†

At first there had been Laredo and then it was the New York City Tombs. At first Helen Sobell had wondered why they had chosen to place her husband there instead of in the Federal prison. Later it

*About a year and a half later Tessie Greenglass visited her daughter again in the death house at Sing Sing and renewed this proposal. Ethel described it in a letter to her attorney, dated Jan. 21, 1953:

"Dear Manny,

"This is to let you know that my mother was here on Monday . . . I am still in a state of stupefaction over its bold-faced immorality. . . . Our conversation follows. . . . Said she: 'So what would have been so terrible if you had backed up ~~his~~ Davy's story?' I guess my mouth kind of fell open. 'What,' I replied, 'and take the blame for a crime I never committed, and allow my name and my husband's, and children's to be slandered to protect him? . . . Wait a minute, maybe I'm not getting you straight. Just what are you driving at?' She answered, 'Yes, you get me straight; I mean even if it was a lie, you should have said it was true anyway! You think that way you would have been sent here? No, if you had agreed that what Davy said was so, even if it wasn't, you wouldn't have got this!'

"I protested . . . 'But, Ma, would you have had me willingly commit perjury?'

"She shrugged her shoulders indifferently . . . 'You wouldn't be here!' "

†From the article by Helen Sobell, *op. cit.* *Note:* The sections concerning Morton Sobell in this chapter are based on personal interviews with Mrs. Sobell.

10 "How the Pattern Keeps Unfolding"

*"How the pattern keeps unfolding. More political arrests, disregard for the rights of people and for the Constitution, and a greater hysteria through the country . . ."**

IN THE two months preceding trial the progression of world events moved swiftly. On January 11, President Truman obtained approval from Congress for the first shipment of four fighting divisions to Europe. Since this commenced our open liaison with members of the former Nazi General Staff, no one was surprised at the news on January 15 that the life of the notorious Ilse Koch had been spared. Despite the macabre evidence of her gruesome crimes (lampshades of human skin) she was soon given her full freedom.

In Korea the continuing retreat of our troops further intensified the need for scapegoats at home. Perhaps at no time since the news of the Soviet Union's first atomic explosion was the fear as great as it was in these early months of 1951. The nightmare of what we had done to Hiroshima and Nagasaki returned to us in the form of daily "fright" stories disguised as news. For example, these were the New York *Journal-American* reports of January 8 and 9:

"IF SOVIETS START WAR, ATOMIC BOMB ATTACK EXPECTED ON NEW YORK FIRST"

"Nobody will have to run if H-bombs start detonating. A big black cloud full of radio-active particles will get you even if . . . you happen to be browsing around the bottom of an abandoned lead mine."

Day after day such accounts continued to whip up tension. Metropolitan centers were pictured as utterly defenseless. With one blast 160,000 city dwellers would be annihilated. Atom bombs would be smuggled into our ports by Russian or Polish steamships. With such

*From a letter by Julius Rosenberg to Mr. E. H. Bloch.

and restored her prestige in time for the Rosenberg trial.* Thus Bentley, like Gold, also met the acid test of convicting a former "spy contact."

Before we leave the Remington trial it is well to take note of Mr. Saypol's tactics during cross-examination of a defense witness named Redmont, which concluded in actual Jew-baiting! If this is incredible to those who have accepted the argument that no possible anti-Semitism was present in the Rosenberg trial on the specious grounds that Saypol, Cohn and Kaufman are Jewish, here is the opinion of the United States Circuit Court of Appeals reversing the Remington verdict:

> "We wish . . . to admonish counsel for the prosecution that in case of a retrial there should be no repetition of the cross-examination attack upon defense witness Redmont's change of name.
>
> ". . . On cross-examination the prosecutor continued his inquiry of this matter long after it became clear that the change of name had no relevancy to any issue at the trial, and *could only serve to arouse possible racial prejudice on the part of the jury.*" (Emphasis added.)

v

> *". . . Every inmate, almost to a man, waves, shouts a greeting and smiles warmly as he passes [my cell]. . . ."*†

It was the morning of March 5, 1951, the day before trial, and Julius Rosenberg was awaiting the arrival of Emanuel Bloch for a final conference. He had had a sleepless night – the 231st night since his arrest. He had tried to continue his reading of one of the books lent him by his attorney, *The Rise of American Civilization*, by Charles and Mary Beard – but could not concentrate. He would look up as he flipped his cigarette butt into the toilet bowl at the far end of his cell and see the cockroaches which infested the prison. Going after them (he referred to it as "game hunting") had become a "nightly diversion."

*This Court of Appeals reversal was on Aug. 22, 1951, some five months after the Rosenberg conviction. However, on Jan. 27, 1953, Remington was retried and convicted. He was sentenced to a three-year term in Federal prison. Late in 1954 he was murdered in prison.

†Letter of Julius to Ethel, dated April 19, 1951.

In the conference with Mr. Bloch (as subsequently related to this writer), the most important question was whether or not Julius and Ethel were to use the privilege of the Fifth Amendment. The question had come up in previous talks and both Julius and Ethel had remained firmly convinced that standing on their constitutional rights was not only a principled position but the only practical one. While Emanuel Bloch agreed completely, nevertheless he felt Julius ought to know the viewpoint which Alexander Bloch had expressed to him recently.

"My father takes this position, Julie," the attorney stated simply. "Let's assume you were Communists. It would sound better to a jury if you said so in that case."

To this Julius replied that he had given the jury's possible reaction considerable thought. First, they were not Communists; but what good would it do even if they repeated this a hundred times? Would the jury believe them? Saypol would need only to bring up the fact of Julius' FBI-inspired dismissal from the Signal Corps, and, notwithstanding his written denials, whom would the jury be inclined to believe? It would be his word against that of the FBI. In addition Saypol was sure to counter with the widely accepted theory that all Reds were trained to lie.*

...Look at Remington who had not taken the privilege in his trial back in January, and had even tried to prove his "anti-Communist views." Had the jury believed him? Look at Alger Hiss, who had been vouched for by Dulles, Acheson, Justice Frankfurter and Governor Adlai Stevenson. Here was the former president of the Carnegie Foundation for International Peace also denying Communist Party membership. What had happened to him...?

And there was another reason why their position, being a principled one, was proper. Once they abandoned their privilege, Julius pointed out, and opened the area of questioning, would not Saypol seek to drag in every one of his classmates who had happened to

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*In sentencing six Michigan Communists after a Smith Act trial, United States District Judge Frank A. Picard stated to the defendants:

"...There isn't any doubt in my mind, and there wasn't any doubt in the jury's mind, that there is nothing you wouldn't do — lie, cheat, or even worse — in order to obtain your objectives." (*U. S. News & World Report*, March 19, 1954.)

Note: It stands to reason that with such a predetermined point of view as Judge Picard's, a sham was made of the very trial he presided over, since it automatically ruled out all defense testimony as perjurious and also denied the presumption of innocence.

work at Fort Monmouth?* Why should he deliver the names of these friends to the insatiable McCarrans, Veldes and McCarthys to be hounded and ruined?

And here another important question had to be decided, that of asking friends and neighbors to testify as character witnesses. And on this, too, Julius and Ethel were in agreement that it would serve little purpose. For one thing, such character witnesses could swear only that they had known the Rosenbergs as a decent, moral, honest and hard-working couple. But Saypol would hardly trouble to contest this. In fact with the grotesque logic by which everything was stood on its head these days their very virtues might be presented as a "front" behind which the "spy ring" operated.†

For another thing, suppose Saypol threw the question at them: "Do you know for a fact that your friends the Rosenbergs were *not* spies?" What could the friend reply but a feeble, "Well, I don't know — but I am sure they couldn't have been." And to this Saypol could retort, "If Alger Hiss was able to fool Dean Acheson and John Foster Dulles, certainly the Rosenbergs could fool you!"

Finally, there was the danger that such friends would be asked about their own political beliefs and associations. How many could afford to risk perjury prosecution by truthful denials or contempt citations by refusal to name other friends? And if they took the privilege, would not their character endorsements be considered worthless as coming from "Fifth Amendment Communists"?

Above all, as Julius summed it up, they were concerned with the jury hearing the truth of their innocence, and therefore why allow the prosecution to turn the trial into a political circus when by their taking the Fifth Amendment it could be forced into a show of evidence.

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*Headline of Oct. 7, 1953, in Los Angeles *Times:*

"FIRING OF FIVE MAY END IN PROBE
RIVALING ROSENBERG SPY CASE"

This was the opening salvo of McCarthy's investigation of Fort Monmouth, since recognized as a "phony crusade." See survey made by New York *Times*, Jan. 11-13, 1954, and its editorial conclusion that it "must leave any impartial reader with a sense of uneasiness, if not dismay."

†In Judge Picard's sentencing speech previously quoted, he adds:

> "... There hasn't been a divorce among the whole six of you. None of you make any money on this. You're not mercenary so far as the FBI ... have been able to learn and tell me. You have wives and children who are devoted, *but you have that quirk in your thinking.* ...
>
> "You, Mr. Allan, are a rather likable person both in looks and manners and would make a good newspaperman, but you have those ideas too, and *because you are such a likable person you are ... dangerous.* ..." (Emphasis added.)

(*Note:* The opinion of many lawyers with whom this writer has discussed this principled stand of the Rosenbergs was that while it was unrealistic and even naïve it should have tended to convince the jury of their innocence. Because if one believes the prosecution's theory that Julius was truly the veteran spy, then one must assume that he knew that the "jig was up" as he faced exposure by his own relatives. If this was the case, it is inconceivable in the climate of 1951 that he would brand himself as a 'Communist hiding behind the Fifth Amendment."

Since there was no proof offered by the Government that he was a member of the Communist Party, he could have forsaken his constitutional privilege and risked a perjury charge in another prosecution and a maximum sentence of five years. And if he refused to inflict similar risks upon friends whom he might be called upon to name as the result of opening the area of questioning, then all he would have risked in this regard would have been a series of contempt penalties.

It would seem conclusive, therefore, that if he were a spy realizing he was on trial for his life he would gladly have accepted these comparatively minor risks. Instead, his attitude on this issue appears to have been the very opposite of a man with any consciousness of guilt.)

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When he visited Ethel later that day Mr. Bloch received much the same reaction. Regarding those few friends who had offered to appear as character witnesses, Ethel asked him to extend her heartfelt thanks. She knew only too well what courage such offers entailed. During recent visits from members of Julius' family she had heard about the panic that had overtaken almost everyone who had ever known them. One friend, who had first heard of their arrests on the radio, had confided to one of Julius' sisters:

> "I was shocked. I was sick for a week. I had to go to bed, and for a week I couldn't sleep. I simply couldn't figure it out. . . . I thought something's wrong."

An engineer himself, this friend had seen and talked with David Greenglass frequently in Julius' machine shop. When he had read that David confessed stealing atomic secrets, his immediate response had been that the whole thing was preposterous:

> "He was no more capable of it than a salesman without any technical education would be. I know of my own knowledge that

11 | Young Man in a Hurry

*"A judge, like other human instruments of government or justice, is or comes to be the product of his environment, his education, his experience, and yes, his prejudices."**

IN 1951, the year of the Rosenberg trial, Irving Kaufman was still known as "the boy judge," for he was only forty years old. He lived a sedate family life in his Park Avenue apartment with his wife and three sons—the oldest, Robert, twelve; the twins, James and Richard, aged nine. A devoted father, he would take his three boys each Saturday to the Yankee Stadium for the best in baseball and on Sunday mornings the family attended the reformed Park Avenue Synagogue. His personal habits, we are told by Oliver Pilat in the New York *Post* of January 11, 1953, were ruled by an "iron discipline." He would smoke no more than "two cigars a day, one after lunch and one after dinner. Never more, never fewer."

It must be mentioned that his name has often been confused with the Honorable Samuel H. Kaufman, a Federal judge in the same Southern District, who came under severe criticism including threat of disbarment because of his impartial conduct of the first Hiss trial which ended in a hung jury. Many people believe it was Samuel Kaufman who was the presiding judge at the Rosenberg trial. Unfortunately, he was not.

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The foundations for what has been called Judge Kaufman's "whirlwind career" were laid in his undergraduate years at Fordham University. From the day he enrolled to the day he was graduated with highest honors he had always "impressed the Catholic fathers who taught him."† They stared with amazement not only at this small

*From an article, "No Longer a Judge," by U. S. Federal Judge Delbert Metzger, United States District Court of Hawaii from 1939 to 1952. (*The Nation*, July 18, 1953.)

†This excerpt and others to follow concerning Kaufman at Fordham are from an article, "Rosenberg Case: Judge Kaufman's Two Terrible Years," *Saturday Evening Post*, Aug. 8, 1953.

A. Yes, sir.
Q. What was the name of that company?
A. Nat E. Berzen. . . . I am vice-president in Nate Berzen Company.
Q. Will you tell us again what the business of Berzen is?
A. It deals in scrap rubber and crude rubber.
Q. How long have you been with them?
A. 27 years.

Evidently the defense, feeling that a vice president of a rubber company associated with a government agency might not be as objective as he believed himself to be, decided to challenge him.

It should be pointed out that wage earners were looked upon with open distrust by the prosecution whether they were Jewish or not. For example, here is the unacceptable background of a Mr. Albert Wallace:

The Court: Mr. Wallace, you are a longshoreman?
A. I am.
Q. For the United Fruit Company?
A. That's right.
Q. How long have you been so engaged?
A. Pretty near four years.
Q. Are you married?
A. I am.
Q. Is your wife employed?
A. As a domestic.
Q. As a domestic?
A. Yes.
Q. Have you any children?
A. One.
Q. School age?
A. Yes.

This was Mr. Wallace's *total examination*, but a moment or two later we see the clerk calling out:

"Morris Haber and Albert Wallace excused by the Government."

To return to the original question: Why is it that Saypol and Kaufman were so determined to have an all-Gentile jury, save possibly for a vice president of a rubber company? Did it believe Jewish jurors would be more merciful than Catholics or Protestants? Hardly. Their reasoning was simply that there was too much at stake to risk

a possible hung jury. One may safely venture that Kaufman and Saypol would have been overjoyed with the inclusion of the *right, dependable* kind of a Jew. For then the Government would have had yet another weapon to use in reply to possible charges of anti-Semitism.

But what if, despite all precautions, the *wrong* kind of Jew were chosen? What if such a juror still happened to remember what Hitler had done to his 6,000,000 co-religionists in the name of saving Western civilization from the "Jewish rulers of the Bolshevist center"?* What if such a juror saw in the Rosenberg case an ominous parallel to the Nazi charge that all Jews were traitors? Suppose there were a split verdict with one Jew voting for acquittal and eleven Gentiles for conviction? Would this isolation not be equivalent to an admission of minority persecution? From the viewpoint of the American Jewish Committee, which had already recognized the urgency of having someone like Kaufman preside over the Rosenberg case in order to obviate all possible charges of anti-Semitism, such a result would be nothing less than a disaster.†

It may be justly contended that the Government had every right to screen out jurors suspected of latent prejudice in favor of the defendants. *But, on the other hand, we will see that it made certain to select a jury with the strongest prejudice against the defendants.*

Immediately following the Attorney General's list, Judge Kaufman asked whether any of the jurors had read the articles of:

"Westbrook Pegler
Walter Winchell
John O'Donnell
Frederick Woltman
Nelson Frank
Howard Rushmore
Louis Budenz
Fulton Lewis, Jr.
Elizabeth Bentley"

And when all the jurors had indicated they were more or less familiar with the opinions of these popular columnists, the Court asked:

> "Now, as a result of anything you have read in the columns of these newspaper men or . . . heard on the radio . . . have you

*From Hitler's proclamation on the invasion of the Soviet Union. (See New York *Times*, June 23, 1941.)

†The American Jewish Committee is a self-appointed group of reactionary Jews who may best be compared to the "Judenrat," those benighted German Jews who sought immunity from Hitler by supporting his campaign against "Jewish Bolshevism."

Note: In John Hersey's superb study of the Polish "Judenrat" in *The Wall*, Knopf, New York, 1950, there is the almost perfect parallel to the American "Judenrat."

In contrast to Kaufman's approval of Mr. Baring-Gould, let us see what happened to a Mr. Donald S. Layman, who volunteered that he had once read *In Fact* out of "curiosity" and only "occasionally":

> The Court: As a result of having read that magazine, have you come to the jury box with any particular prejudice for or against either side?
>
> Mr. Layman: Not for or against either side, no.
>
> The Court: Do you feel that you could leave your mind open and decide this case based on the evidence and the evidence alone?
>
> Mr. Layman: Yes.

Later on, however, we find Kaufman announcing that he has excused Mr. Layman, whereupon the defense inquired:

> Mr. E. H. Bloch: May I direct an inquiry to the Court: Is that a peremptory challenge on the part of the Government?
>
> The Court: No, it is my challenge.
>
> The Clerk: Donald S. Layman is excused.

Another prospective juror, Mr. Carl O. Roach, was considered by Kaufman as unqualified to serve on two counts. He was a confessed graduate of C.C.N.Y. and an admitted subscriber to the *National Guardian* "for a period of three months."

Returning to the list of "verboten" organizations, it must be emphasized that the screening process eliminated every possible liberal or progressive citizen (whether Jewish, Catholic or Protestant) of foreign birth or descent who might have been:

1. An anti-Monarchist Jugoslav or Croatian, or
2. an anti-Horthy Hungarian, or
3. an anti-Mussolini Italian, or
4. an anti-Metaxis Greek, or
5. an anti-Franco Spaniard, or
6. an anti-Hitler German.*

In all justice to the prosecution, it should be stated that the Attorney General's list did include three native Fascist organizations:

*By virtue of association with these "subversive" organizations:
American Committee for Jugoslav Relief
American Women of Croatian Descent
Hungarian-American Council for Democracy
Joint anti-Fascist Refugee Committee
American Council for a Democratic Greece
Macedonian-American Peoples League
Comite Coordinator Pro Republica Espanola
American League against War and Fascism, etc.

the German-American Bund, the Ku Klux Klan and the Silver Shirt Legion of America. Therefore, one must concede that some attempt was made in the interests of fair play; to be exact, at a ratio of 3 to 105.

What must be clearly understood is that the entire screening process *insured* the presence of jurors favorably disposed to the side of the Government by the simple method of asking each prospect to evaluate his own prejudices. Hence, those honestly aware of their bias eliminated themselves. For example: a Mr. Batch, who had a cousin killed in the war and thought he might not be open-minded: a Mr. Tormey, who was frankly anti-Communist and asked to be excused; and a Mr. Fleck, who declared that "under the present circumstances" he did not feel he could give the defendants "a fair and equitable opinion."*

Let us grant that those jurors who were finally selected were equally sincere in their self-evaluation. Yet, how many bigoted people do we know who will insist they are the soul of tolerance? There comes to mind the statement attributed to an eminent Broadway theatrical producer during the appearance of the "Hollywood Ten" before J. Parnell Thomas' un-American Activities Committee.

"If I had my way," he declared heatedly, "I'd put every single one of those Commies up against the wall and fill 'em full of lead!"

"Why would you be so extreme?" a shocked listener asked.

"Because I've always been against force and violence."

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Somehow, despite the many called, only one woman passed through the fine sieve.† And since it was Saypol who challenged almost all of them, we may presume that he feared that women jurors might find it too difficult to bring in a conviction which could send to her death a young wife and mother of two children.

Nevertheless, a lady was found, willing and capable of serving — indeed one who had enjoyed considerable experience as a Grand Juror. Her name was Mrs. Dammas. Here is her background:

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*In addition, a Mr. Paplinger and Mr. King, as well as a half dozen others, were frankly opposed to the death penalty.

(*Note:* Throughout the examination, the jurors were reminded by Judge Kaufman again and again that "The matter of punishment [was] completely within the province of the Court.")

Mr. William Melvin, who had six children and nine dependents, is an example of those who could not afford the luxury of jury duty.

†One alternate juror was also a woman: Mrs. Edna Allen, whose husband worked for the Consolidated Edison Company, and who had a son in the Army's Chemical Corps.

[Mrs. Dammas]: . . . My son-in-law is in the National Guard, that is all, and I have served on the Grand Jury, that is all.

The Court: Bronx County Grand Jury?

Mrs. Dammas: Bronx County, in May, 1950.

Q. By reason of either of those facts. . . ?

A. It wouldn't have anything to do with it, as far as I am concerned. I will listen to the evidence.*

Further questioning disclosed that she had been employed as a switchboard operator, and that her husband was a dispatcher for the Interborough Rapid Transit Company. Shortly thereafter we find that although the Court advised both the prosecution and the defense that each had its last challenge coming up, both sides waived. In discussing this point with Mr. Bloch, this writer learned that he and his associates were so relieved at finally seeing a woman in the jury box that they were willing to overlook her somewhat forbidding background. Had they used up their last challenge on her, the result might have been not only an out-and-out hostile juror, but an all-male jury.

One Negro, Mr. Emanuel Clarence Dean, also managed to make the final twelve, and here, too, the defense was so relieved to obtain one member of a minority race that it was willing to risk his potentially prejudicial background:

The Court: Mr. Dean, what do you do?

A. I work for the Consolidated Edison Company.

Q. Will you speak up a little louder, please?

A. Consolidated Edison Company, demonstrator.

Q. How long have you been with them?

A. 11 years.

If it should be asked why the prosecution did not exercise its last challenge against Mr. Dean, the same reasoning the defense used was evidently applied in reverse. For with Mr. Dean, Saypol readily saw the advantage of having another employee of the Consolidated Edison Company.† If he exhausted his last challenge on Mr. Dean, his

*In view of the prolonged period persons usually serve on Grand Juries, Mrs. Dammas would appear to be almost a professional juror.

†It is worth considering how this single Negro must have felt among his eleven white co-jurors. Certainly, his viewpoint must have been that of the average Negro in relation to the white man's world, with himself on trial, so to speak. As an employee of the Consolidated Edison, it is certain, too, that he must have been aware of the dangers of "voting the wrong ticket." He had put in eleven years to rise to the position of a demonstrator, evidently in the selling of electrical appliances to Negro clientele. Such a position is a prized one among a "second-class" citizenry, who, for

replacement might be a woman such as Mrs. Field whose husband was born in Russia – or a man like Mr. John C. Richardson, whose wife's mother had been born in Russia – or someone presenting an even more "dangerous" background.

In any event, let us present the chosen twelve – those twelve who had not permitted themselves to be biased, prejudiced or influenced by anything they had ever read or heard against the alleged Communist atom spies and traitors. Here they are:

No. 1: (Foreman) Vincent J. Lebonitte. Residence: White Plains. A manager for an R. H. Macy branch in that suburb.

No. 2: Richard Booth. A caterer for a tennis club in Forest Hills, Long Island, called the "Seminole Club."

No. 3: Howard G. Becker. Residence: Mamaroneck, New York. An auditor for the Irving Trust Company for twenty-four years.

No. 4: James A. Gibbons. An accountant for the New York City Omnibus Company for twenty-eight years.

No. 5: Charles W. Christie. An auditor for the Tidewater Associated Oil Company, which had "contracts with the Government" to do war work.

No. 6: Harold H. Axley. A restaurant owner, previously employed as a civilian expert in the finance department of the Army from 1942 to 1946.

No. 7: Emanuel Clarence Dean. (Already mentioned.)

No. 8: Chauncey E. Miller. Residence: Scarsdale, New York. A secretary of the Board of Commissioners of Pilots, an agency of the State of New York for twenty years. A member of the American Legion.

No. 9: Mrs. Lisette D. Dammas. (Already mentioned.)

No. 10: Charles J. Duda. Residence: Dobbs Ferry, New York. A bookkeeper for Davis and Lawrence Company.

No. 11: James Mitchell. An accountant with Harris, Kerr, Forster & Company. When previously employed by the U. S. Post office, he was passed by "the Lawless Probe."

No. 12: James F. Tessitore. Residence: Mount Vernon. An estimator for the Alco Gravure Division of Publications Corporation. During World War II, "printed millions of topics for the Government."

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the most part, can only look forward to menial jobs such as porters, elevator operators and the like.

It is the popular notion that a Negro juror ought to be inclined to favor the underdog and recognize the persecution of others. However, Government prosecutors, in political trials in which there have been a sprinkling of Negro jurors, have won an uninterrupted series of convictions.

As for the alternate jurors, who had no voice in the verdict since no member of the regular jury fell sick or was otherwise excused, these were:

Alternate No. 1: Mr. John F. Moore. ~~Residence: Bronx~~; a business representative for the Consolidated Edison Company.

Alternate No. 2: Mr. Emerson C. Nein. ~~Residence: Bronx~~; an officer and auditor for the Empire State Bank.

Alternate No. 3: Richard Lombardi. ~~Residence: White Plains Road~~; a government employee (Postoffice).

Alternate No. 4: Mrs. Edna Allen. (~~Already mentioned.~~) ~~Residence: Bronx.~~

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iii

"The most dangerous enemy to truth and freedom amongst us is the compact majority."

— Henrik Ibsen

Such then was the jury chosen to consider the fate of the Rosenbergs and Sobell. Fulfilling the instructions of the Court, all of them swore that their minds were completely open: Not one had formed any opinion favorable to the Government or unfavorable to the defendants. Not one felt friendly or unfriendly to Communism because of membership in such organizations as the American Legion.

And such was the jury of their peers and equals: Almost each and every one representative of the safe, dependable, corporation-employed "experienced" juror type.† So many of them accountants, auditors or executives, but not one employed in the arts and professions. No school teachers or writers, no doctors or dentists, no journalists or editors, no social workers, no architects, no scientists, no nurses, no engineers, no actors, singers or musicians. No one in the allied arts or crafts, such as a jewelry designer or an X-ray technician. And certainly, no manual worker such as a bricklayer, a carpenter, an electrician, a furrier, a longshoreman, a plumber, or a welder.

In sum total, all twelve jurors were politically pure and inviolate. And with all of them so certain that their minds were as unsullied as "a white sheet of paper with nothing on it," perhaps Judge Kaufman was intuitive in his choice of words addressed to all these experts in auditing — that their task was merely a matter of adding a column of figures and getting a result.

*Together with Mr. Dean and Mrs. Allen — this makes almost a 19 per cent representation for the Consolidated Edison Company.

†"Many of you are experienced jurors...." (See statement by Saypol, Record, p. 177.)

That in the middle of July, 1950, about one month after David's arrest, Ethel had come bearing "gifts" of a pie for Ruth and unspecified sundry gifts for Ruth's three-year-old son.

That Ethel had said she had been advised by her lawyer "to get assurances . . . that David would not talk." That Ethel had said "it would only be a matter of a couple of years" for David, and that if he would join Julius in a stand of innocence, "it would strengthen their position" and everybody "would be better off."

And, finally, that Ethel had asked commiseratingly: "Do you think it is a dirty shame for David to take the blame and sit for two?"

Here an innocent visit was twisted into an attempt on the part of the Rosenbergs and Mr. Bloch to impede justice, for the fact is that Ethel frankly admits this visit, albeit under different circumstances. In the first place, Ethel's visit was not at Ruth's house but at the home of Ethel's mother. The latter had just returned from seeing David in jail and Ethel had found her sister-in-law also there. Ethel had asked anxiously about her brother's health and what she could do to help him, even offering to borrow money to contribute to his defense. This was all; a perfectly normal and natural concern on the part of a sister for her brother.

Is it conceivable that Ethel would have been advised by Mr. Bloch to make such incriminating overtures to Ruth in the face of her icy silence ever since David's arrest? It was already several weeks since Julius had been questioned by the FBI concerning David's charges. In all this time Ruth had never made the slightest effort to approach the Rosenbergs on any friendly basis. Would any responsible attorney, considering such hostile circumstances, have dared to advise his client to place herself in additional jeopardy with someone who was clearly scheduled to appear in behalf of the prosecution?*

How transparent is Ruth's effort to add something, *anything* to her sister-in-law's guilt beyond the typing! Not only is there the absurdity of the "gifts," but the attempt to put into Ethel's mouth the statement that David's punishment "would only be a matter of a couple of years," *i.e.*, if he fought the charges and was convicted. When one considers the forbidding climate of the period, as well as the fact that every newspaper was emphasizing the possibility of the death penalty,† it is just fantastic to think that Ethel and her counsel would ever undertake such an appeal to the coldly calculating Ruth on the illusory or specious grounds the latter describes.

*See Record, pp. 1343-1344, wherein Mr. Bloch puts this question squarely before the jury.

†Here is the New York *Times* of June 17, 1950, following Greenglass' arrest: "Could Get Death Sentence . . . Greenglass, if convicted, faces a maximum penalty of death."

his place on the bench. After reviewing the issues involved in the appeal together with Judges Augustus Hand and Jerome Frank, their unanimous decision was that "possible prejudice" had been present during the trial and that a stay of execution was mandatory. According to the New York *Times* of Feb. 18, 1953, Judge Frank stated at the hearing of the reconsidered appeal:

> "There is substance to this argument [of the defense] and for my part, I believe the Supreme Court should hear it."

Needless to say, the prosecution was not a little startled at this sudden turn of events. Only the day before Judge Kaufman had set the new date for the execution. Now, to its astonishment, here was the famed Judge Learned Hand, who had replaced the previous Chief Judge, Thomas Swan, sending on the appeal to the Supreme Court with this indignant comment:

> "People don't dispose of lives, just because an attorney didn't make a point. . . . You can't undo a death sentence. There are some Justices on the Supreme Court on whom the conduct of the Prosecuting Attorney might make an impression."

And as the prosecution began to bluster that the case had been continuing long enough and that it was time to execute the Rosenbergs without further delay, Judge Hand reprimanded him sternly:

> "Your duty, Mr. Prosecutor, is to seek justice, not to act as a time-keeper."

It was a triumphant moment for American justice, but one that was short-lived. For when the appeal reached the Supreme Court on March 28, as we know now from the subsequent disclosure made by Justice Hugo Black, its members voted to deny it without even reviewing the trial record and therefore without affirming "the fairness of the trial."*

For those Americans who have been repeatedly deceived by official declarations that the Rosenbergs received their full measure of justice in the course of their appeals to the Supreme Court, here is Justice Black's full statement appearing in the New York *Times* on June 20, 1953, the morning after the death of the Rosenbergs:

> "It is not amiss to point out that this Court has never reviewed this record and has never affirmed the fairness of the trial below. Without an affirmance of the fairness of the trial by the highest

*On this second appeal, Justice Douglas joined with Justice Black.

a message to transmit to her "superior." That since Golos was not always at hand and maintained a separate residence, she would get up and get dressed to go out to relay the message by telephone. Here was the alleged procedure described in redirect examination:

> [Bentley]: . . . To show the incredible things that Communists will go through in order to carry out their jobs . . . when I was called at 2 in the morning I often had to go out and go many blocks in the cold to get a pay telephone to call Mr. Golos. . . . *It was considered unsafe for me to call out of my own telephone.* (Emphasis added.)

As already indicated, Bentley did not *know* who this "Julius" was, and on cross-examination admitted that she could not even identify her caller's voice as that of Julius Rosenberg. Evidently perturbed by this, Judge Kaufman asked her hopefully:

> The Court: Did you ever meet a person, did you ever meet anybody in person, whose voice you heard, and you can now say is the voice of the man who identified himself as Julius on the telephone?
>
> A. No, I have never met anyone whose voice I heard, whom I could identify as Julius.

Just how many thousands of men in and around New York City happen to be named "Julius" this writer cannot even estimate. However, even if we are to believe her testimony, any one of these thousands could have telephoned Bentley. And yet, on this single item and on this alone, she was permitted to testify for fifty-nine pages of the record; not about the unidentifiable "Julius" but chiefly about her alleged role as a top courier for the Communist International.

It is important to point out that the only witness who could possibly have corroborated Bentley's testimony was Jacob Golos — conveniently quite dead. In fact, with both Gold and Bentley, much of their testimony hinges on deceased or absent persons. At the Brothman trial Gold relies for corroboration on two dead men, Jacob Golos and one Carter Hoodless. In his charges against Slack the only witness who could confirm Gold's testimony was a dead man named Briggs.* At the Rosenberg trial Gold's entire testimony concerning

*In the case of Alfred Dean Slack, the chemist who was arrested in Syracuse, N. Y., the Government's charges were that he had met Gold in 1940 through "a man named Briggs." Briggs died in 1939, or one year *before* the alleged first conspiratorial meeting!

Note: It is little wonder that Slack made a "deal" to plead guilty in exchange for a promise of a ten-year sentence with parole in three years, as

But this much is certain: That a good deal of Julius' comings and goings throughout the period of the alleged conspiracy were known to the FBI. Neither can there be any doubt that his phone was periodically tapped, that his mail was opened, that his bank accounts were photostated, and that every one of his friends and classmates whose names were later revealed at the Perl trial and at the McCarthy investigation at Fort Monmouth was thoroughly checked for possible espionage.

And yet, in all these years, the FBI failed to discover anything dealing in any way with espionage! For if they had found *something*, no matter how slight, it surely would have been presented as a Government Exhibit for Mr. Saypol to thump down on the jury-box rail as he did with the little coin can labeled "SAVE A SPANISH REPUBLICAN CHILD"!

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> *"I have read the testimony given at the trial, and though I have no legal experience in matters of this kind my competence is comparable to that of the jurors and the great public who are concerned about this matter.*
>
> *". . . The government's case rests on the testimony of David and Ruth Greenglass, and this was flatly contradicted by Ethel and Julius Rosenberg. I found the testimony of the Rosenbergs more believable than that of the Greenglasses."*
>
> — Letter of Dr. Harold C. Urey to Judge Kaufman, Dec. 16, 1952

In our analysis of this fatal contest between the Greenglasses and the Rosenbergs, let us view the latter's testimony as a whole and see if it meets the same test of likelihood and credibility we have given that of the prosecution's major witnesses. Do we find any of the gaping loopholes, the unexplained discrepancies, the flat contradictions and sheer improbabilities we find in the testimony of Elitcher, Gold, Bentley and the Greenglasses? Let us recall just one or two of the outstanding features of the prosecution's case, beginning with the crucial console table, and ask ourselves which table is more believable.

Is it the prosecution's vanished table, never produced in court, even though it was available to the FBI for months? Is it Saypol's expensive mahogany table, costing no less than $85, and doing double

protesting throngs at a safe distance. In London, as the minute hand of Big Ben neared the hour of one o'clock in the morning and the great crowd of people who could not sleep that night grew silent before the entrance to 10 Downing Street, suddenly a man sang out alone in the stillness the refrain from "Joe Hill": "I never died, said he . . ."

It was a unique thing – no two children in the entire world had become so known, so pitied, as the two little Rosenberg boys. In Chicago, Los Angeles, San Francisco, in Milan, Buenos Aires and even in places as far off as New Zealand and Iceland, thousands gathered in prayer vigils that night, to pray for them and for the lives of their father and mother. In the United States millions had written hopefully to the President for mercy or clemency and now that it had been refused they were numbed with the shock of disillusionment. For the Rosenbergs had become a symbol. The sparing of their lives had come to express long-stilled hopes for moderation, for a lessening of world tension rather than a continuance of the suicidal arms race, for civilized negotiation rather than atomic diplomacy, for peace rather than war. And now that the death knell was tolling, it tolled not only for the Rosenbergs but for the symbol.

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Within Sing Sing Prison itself there was also tension. Outside its walls, barricading all approaches, was a veritable army of State troopers, police and unknown numbers of Federal undercover men. They were under stern command to prevent any public demonstration such as had taken place twenty-six years before in Boston, the night Sacco and Vanzetti had been executed.

Inside their cell-blocks were some two thousand other convicts waiting for the "grapevine" reports. All of them were acutely aware of the "dance party" to take place shortly. It was the first daylight execution in the history of the prison. For more than two years they had been conscious of the two "C.C.'s" – Condemned Convicts 110,510 and 110,619 – "sweating it out" over in the death house. Many felt a strong empathy with them, not merely as fellow-inmates, but as victims of stool-pigeon evidence. Very few concerned themselves with the legal question of guilt or innocence. Most were troubled by the moral question: How could a society eulogize an informer as a patriot? How could such testimony be trusted at all? Most revolting was the idea of a brother sending his sister to the electric chair.

Many of them had followed the case over the prison radio. They had heard of the Vatican's appeals for clemency, and yesterday they

"Julius and Ethel Rosenberg . . . went to their deaths with a composure that astonished the witnesses."

— New York Times, June 20, 1953

There was only one place where there was any semblance of calm and serenity that day. It was in the women's wing of the death house, where husband and wife were permitted to spend their final hours together, talking quietly through a fine mesh screen wheeled in front of her cell.

At 7:20 o'clock Julius Rosenberg said farewell to his wife by touching the tips of his fingers to hers through the mesh. He was then led to the special execution cell where the guards made final preparations — the slitting of the trouser leg, the shaving of the top of the head. Both were described as so extraordinarily calm even during these last forty minutes of life that the most hardened prison officials were amazed.

It was precisely 8 o'clock when Julius began to walk his "last mile" along that short, narrow corridor leading to the death chamber. Just ahead was the young rabbi intoning from the 23rd Psalm:

> "Yea, though I walk through the valley of the shadow of death, I will fear no evil; for thou art with me; . . . Thou preparest a table before me in the presence of mine enemies . . ."

. . . Nearby, Julius saw the United States marshal waiting, still watching for any possible indication of compliance. He knew all about the fantastic choice now being offered them officially. He knew about the two FBI men stationed at the open telephone line, ready to relay to the Attorney General any sign of weakening. And although they had not told him he was the first to go he knew that too. For if Ethel had been scheduled to precede him, she would have had to pass by his execution cell.

. . . All he needed to do then, to save both their lives, was to nod his head to the marshal there and mumble the few words admitting the "truth" of the accusations; and later, to make it all the more believable, supply the "details" just as David Greenglass had done. It would be so easy. "Names" would be suggested, as well as places and occasions where he had conspired with the "names." What names? Any at all — Comrade X, Soviet Consul Y, Scientist Z — anything to keep the ball rolling. For "names" had become the vital grist for the vast propaganda mill — to keep up the scare headlines, to keep up the national temperature of feverish suspicion and con-

tagious mistrust. More and more names were needed for the dossiers of the neo-Inquisition, for all the machinery to produce thought control and self-censorship. Names had become the magic formula to keep the ball rolling.

. . . And was not this their real crime — their refusal to supply the insatiable demand? Klaus Fuchs had provided, perforce, a Harry Gold; Gold, in turn, had consented to point to a David Greenglass; and Greenglass had offered up a brother-in-law and later had added a sister. But they, the Rosenbergs, they had named no one, not even a higher-up or a lower-down. They had stopped the ball rolling, had stopped the endless game. . . .

Now they were opening the heavy door to the death-chamber. The rabbi was intoning in a low voice, "Thou annointest my head with oil; my cup runneth over."

. . . Had it been anything like this for that young rabbi, Yeshua ben Yussuf, on his bitter path past Golgotha, the place of skulls? Had it been like this for that ancient prophet of his own blood and race, when he had faced his false witnesses, when he had faced his judges who had charged his silence as guilt and blasphemy — his teachings as rebellion against Caesar? Had it been this way, too, when the multitudes had stood by, not daring to question, not daring even to think or feel — when even Peter had thrice failed him — and when the priests, scribes and elders who had reviled and spit upon him came by the cross to further mock and deride him, even in his death throes? And had it been this way, too, when his heart, twisted by despair, had cried out: *"Eli, Eli — Lomo azavtani"* . . . ?

It was 8:02 o'clock when they sat him in the "chair." The witnesses said later that he had kept gazing calmly ahead, that there was a trace of a smile on his lips as the guards strapped him down.

. . . Now they were adjusting the cathode to the leg and lowering the helmet to contact the shaven spot on the head. Ah, there was the Tempter standing against the wall, still waiting for the nod. And there, the three wire-service men waiting to report with clinical accuracy any possible reflex that might denote fear or cowardice. Or did they perhaps expect a final statement, the traditional last favor extended to him about to die?

. . . Now, as the guard approached with the mask, now, if any time, was his last chance to repeat their three-year cry of innocence. But, oh, why repeat the wearisome refrain? How many statements had been offered and still remained unprinted? Not merely statements but photographs, photostats and affidavits — documented proof of the sordid perjuries, of the prejudicial conduct of the

judge, of the inflammatory atmosphere pervading the courtroom, of the "conviction by newspaper" before and throughout the trial and of the entire monstrous frame-up as revealed by all the new evidence. How many statements had been offered by learned and conscientious Americans exposing the political nature of the case as they had come to understand it during this terrible Cold War, now expanding from the burning of books to the burning of scapegoats?

. . . And yet all of it had met with a conspiracy of silence. What had the press printed of the scathing opinion of the trial, written by James Wolfe, the Chief Justice of the Supreme Court of Utah? What had they printed of the "one hundred and more instances" of judicial error, charged by Stephen Love, the former chairman of the Fitness and Character Committee of the Supreme Court of Illinois? What of the world-wide appeals from small and great, from priests, educators, lawyers, writers, cabinet ministers and the heads of state, from the twenty-three rabbis of Jerusalem, from the three thousand American Protestant ministers? All — all had been scornfully dismissed as "Communist-inspired," and whatever had reached public print had for the most part been distorted or falsified.

. . . No, no matter what he might say or how he might say it, they would describe it only as fanatical defiance or employ that phrase one of their pundits had recently fashioned: "a compulsion for martyrdom." No, one did not dare risk this last precious instant here "in the presence of mine enemies." And since there was this desperate measure to bury the truth, then let the eloquence of silence at the very edge of the grave ring out the truth to all the world . . .

"Lord, who shall abide in thy tabernacle? . . .
He that walketh uprightly, and worketh
righteousness, and speaketh
the truth in his heart. . . .
He that sweareth to his own hurt, and
changeth not . . . nor taketh reward against
the innocent.
He that doeth these things shall never
be moved."

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It was 8:08 o'clock when they led in Ethel Rosenberg. The rabbi was reading the psalms she had requested. And there were the two doctors waiting self-consciously for their fee; and there the electrician, poor man, waiting so long to earn his. And over there the vari-

REPLY AFFIDAVIT OF LOUIS NIZER IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT SWORN TO MAY 9, 1975

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

- x

MICHAEL MEEROPOL and ROBERT MEEROPOL, :

Plaintiffs, :

- against - : 73 Civ. 2720 (LPG)

LOUIS NIZER, DOUBLEDAY & COMPANY, INC., and FAWCETT PUBLICATIONS, INC., : REPLY AFFIDAVIT

Defendants. :

- x

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

LOUIS NIZER, being duly sworn, deposes and says:

1. I am one of the defendants in this action, and I submit this reply affidavit on behalf of all of the defendants in support of the motion for summary judgment dismissing Counts I (statutory copyright infringement) and III (for consequential damages) of the complaint and supplemental complaint as well as Count II (libel and invasion of privacy) of the supplemental complaint, previously dismissed by Judge Tyler with respect to the hard cover edition, and now reasserted against the identical work in paperback form.

2. The entire thrust of the answering affidavits is to assert the non-existent proposition of law that an author otherwise entitled to invoke the defense of fair use nevertheless loses it if other material in his book has some alleged factual errors; or if there is some research source he did not use; or because he may have reconstructed from facts or incidental conversations. To state the proposition exposes its illogic. The doctrine of fair use permits an author to use copyrighted material from another work (within the permissible limits outlined in our principal brief), irrespective of whether his own work is subjectively judged to be scholarly, or is based on sufficiently thorough research, or contains some factual errors. The doctrine is based on "the constitutional purpose in granting copyright protection in the first instance, to promote the progress of science and the useful arts....To serve that purpose courts... occasionally subordinate" the copyright holder's interest. (Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966).

3. Indeed, as a practical matter, plaintiffs' novel contention would deny the defense to all non-fictional works as well.. The fact that fair use is a defense available to an author of a fictional work conclusively demonstrates that the entire thesis of plaintiffs' reply affidavits is false. Such an author

may quote copyrighted material whether his own work is music, drama, poetry, philosophy, history, essay, humor, polemic or written material of any other kind. Obviously, such defense would not be available if any of the standards incorrectly urged by plaintiffs (historical value, exhaustive research or accuracy) had to be met. For example, all sources of historical facts, even "primary" sources, are merely the recorded sense impressions of the observer. Consequently, it would be ludicrous to assume that there was ever a historical work which did not contain at least some facts which could be challenged. Plaintiffs' affidavits demonstrate this fact. Two of plaintiffs' affiants contradict each other concerning an alleged error in my book, one of them agreeing with me (See ¶23, infra).

4. There is no case which has refused to sustain the defense of fair use on the grounds that the defendant's work contained alleged errors, was not well-researched or reconstructed, or even fictionalized, undocumented conversations. (See Reply Brief, Point I). Indeed, the cases are precisely to the contrary. The defense has been upheld even where the defendant's work was admittedly one of fiction. Any other rule would completely nullify the defense of fair use by turning every copyright case into a never-ending search for the "ultimate truth" of every sentence of the defendant's work, a test no book could ever satisfy with certainty or finality.

5. The numerous affidavits submitted by plaintiffs in opposition to the motion for summary judgment are irrelevant because they attempt to avoid the application of the defense of fair use on untenable grounds. Even if the alleged facts in those affidavits were true, and they are not, they would fail as a matter of law to defeat this motion. I could therefore ignore these affidavits with impunity. However, lest such appropriate legal silence be distorted by fanatical voices, I will demonstrate by sufficient illustrations that the attempt by plaintiffs to discredit The Implosion Conspiracy is unworthy of serious consideration. As will hereafter be demonstrated (¶ 21 et seq.), the charges made by plaintiffs and their affiants are unjustified, contrary to the opinions of this Court, the Court of Appeals, a host of disinterested experts and, in most instances, ludicrous on their face.

6. In all other respects, the answering papers submitted by plaintiffs confirm the propriety of summary judgment. Practically all of the facts set forth in the moving papers are undisputed. The only "factual" affidavit is submitted by plaintiffs' counsel, not by any witness to the facts alleged therein. In those few instances where facts are denied, the denials are not supported by the kind of evidence required by Rule 56 FRCP. Consequently, as demonstrated below, the requirements for the defense of fair use have been met, thereby requiring dismissal of Count I of the complaint and supplemental complaint (for statutory copyright infringement). Similarly, defendants' right to summary judgment dismissing Counts II of the supplemental com-

plaint (for libel and invasion of privacy) and III of the complaint and supplemental complaint (for consequential damages) cannot be questioned. Finally, the answering papers [illegible] confirm, but underscore the need for the injunctive relief previously requested in the moving papers.

7. The plaintiffs' opposition papers totally fail to create an issue. This conclusion is highlighted not only by the above demonstration of the irrelevance of its proffer, but by an affirmative statement of the true criteria for the availability of the defense of fair use. The following section addresses itself to those criteria which are fully met in the instant case and require the granting of summary judgment.

THE CRITERIA OF FAIR USE

(1) Amount and Substantiality of Copying

8. Plaintiffs do not deny that the total number of words of the letters from Death House Letters in The Implosion Conspiracy was only 1,957 words out of 228,900 words, constituting .024 of the plaintiffs' book and .0085 of defendants' book. (See ¶¶ 1, 8 and 11 of defendants' 9(g) statement, admitted in plaintiffs' response thereto). Plaintiffs attempt to increase this total by adding two letters which were published in The Testament of Ethel and Julius Rosenberg, but not in Death House

Letters.* Since no copyright application was ever filed in the United States Copyright Office for The Testament of Ethel and Julius Rosenberg (See ¶3 of defendants' 9(g) statement, not denied in plaintiffs' response thereto), these additional letters are not entitled to copyright protection and therefore cannot in any event be computed when determining the number of words copied from Death House Letters. Moreover, the long letter of June 16, 1953 (quoted at pages 441-443 of The Implosion Conspiracy), was a petition for clemency to the President of the United States and as such was a historic, and not a private, letter from the outset, and quotable by anybody, being in the public domain.

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* Despite their admission that the two letters were not in Death House Letters (by failing to deny ¶2 of defendants' 9(g) statement) plaintiffs, nevertheless, contend that these letters dated June 16 and 19, 1953 are contained in Death House Letters. (See ¶4 of plaintiffs' 9(g) statement). That latter statement is deliberately and demonstrably false. The Death House Letters (exhibit B to the complaint) bears a publication date of June 10, 1953, and the two letters in question were written later, and therefore could not have been included in a book published before they were written. Thus, the last letter in Death House Letters is dated March 19, 1953. Equally irresponsible and typical of plaintiffs' recklessness in charging errors in The Implosion Conspiracy, are plaintiffs' denials of paragraphs 9 and 10 of defendants' 9(g) statement as to the number of letters allegedly copied and as to the first time in The Implosion Conspiracy the first of said letters appears (p. 393). The statements challenged by the plaintiffs come from their own answers to interrogatories (see moving affidavit, ¶4; plaintiffs' Answer to Interrogatory No. 1).

9. Plaintiffs' contention that the copying of even .024 of Death House Letters is "substantial" is similarly meritless. Their affiant, Austin Olney, can cite no legal authority for his arbitrary 300 word test.Mr. Olney's company, Houghton-Mifflin, is the same company which is publishing plaintiffs' book, We Are Your Sons (¶14 of defendants' Rule 9(g) statement, admitted in relevant part in plaintiffs' response thereto). For their part, defendants rely on Judge Tyler who has already found that "from a quantitative viewpoint, the quoted letters make up a very small portion of The Implosion Conspiracy", 361 F. Supp. 1063 at 1066. This conclusion is the law of the case in this action. Moreover, as demonstrated in Point I of the accompanying memorandum, the defense of fair use has been sustained where the copied material constituted a much more significant portion, both quantitatively and qualitatively, of the prior copyrighted work than do the letters involved here. The instant case is a fortiori within the rule.

(2) Purpose and Character of Use

10. Where the purpose of the quotation is to explain or illustrate the historical development of the subject matter, it clearly conforms with the second test of permissible use. Unlike many cases where the second author attempts to pass off the prior work as his own creation, I clearly indicated that I was quoting from the letters themselves in each instance

challenged by plaintiffs, thus demonstrating the above purpose. There has already been a judicial finding that this criterion has been met by The Implosion Conspiracy. In his opinion denying the preliminary injunction, Judge Tyler held:

> "As I read The Implosion Conspiracy the quotations were used with discretion and with demonstrable purpose to illustrate, from an historical and legal point of view, the post-conviction appeals and petitions for clemency which were filed by and for Mr. and Mrs. Rosenberg. The relevant portions of the book almost certainly will provide reasonably valuable source material for future historians, biographers and social scientists."
>
> * * *
>
> "Thus, defendants are likely to prove that their book is a serious, full and readable account of what was a trial of great historical interest; that resort to quotations of certain of the Rosenberg letters is important to any serious book on this trial ..." 361 F. Supp. 1068, quoted with approval in Meeropol v. Nizer, 505 F.2d 232, 237 (2d Cir. 1974).

11. This finding by the Court is further confirmed by plaintiffs themselves in their recent book, We Are Your Sons, in which they assert that the letters published in Death House Letters were intended by their parents to be used to evoke popular support for their appeals, motions for new trials and, ultimately, their plea for clemency. Plaintiffs stated:

> "Our parents came to realize that their correspondence could be utilized as aids in the campaign to save them." (p. XII)

Thus, resort to the letters was important to a study of the Rosenberg case. So as not to expand this record by attaching still another book to this motion, we have not physically annexed a copy of We Are Your Sons to this affidavit. However, we are prepared to furnish the Court with a copy and request that it be deemed marked Exhibit A to this affidavit.

(3) The Nature of the Copyrighted Work and Whether its Demand has been Reduced.

12. Quotations from another book are a compliment to their author and usually enhance his reputation, as well as calling attention to his work. The commercial result may well be to increase the sale of his work. It is only where the two works are of the same character, and the quotations are substantial (not minuscule as in the instant case), that the question arises whether there has not been commercial interference with the copyrighted material; whether the use of it is unfair, rather than fair.

13. The facts in the instant case overwhelmingly establish that this third test of fair use has been satisfied. It is undisputed that Death House Letters and The Implosion Conspiracy are completely different in purpose and scope. Consequently, the two books are not at all competitive in a literary or in a commercial sense. Moreover, since Death House Letters had not been sold in the United States for almost two decades, it can hardly

be claimed that demand therefor was reduced by the publication of The Implosion Conspiracy in 1973.

14. This Court has already found that "The parties agree that Death House Letters has been out of publication for almost twenty years" and "there is absolutely no suggestion, let alone proof, that the publication of The Implosion Conspiracy has lessened the value of the letters of Julius and Ethel Rosenberg." 361 F.Supp. at 1065, 1069-70. The accuracy of this finding has since been supported by the documents produced on discovery. Not only were sales of Death House Letters and the income derived therefrom minimal even at their peak (moving affid. ¶¶ 11-14), the tax returns and financial statements of Jero Publishing Company ("Jero") and The Rosenberg Childrens Trust Fund ("Trust Fund") clearly acknowledge that plaintiffs have received no income from the sale of Death House Letters since June 30, 1956, some 17 years before The Implosion Conspiracy was published. (Defendants' 9(g) statement, ¶7).

15. Incredibly, plaintiffs' counsel denies that there was no income from sales of the Death House Letters since 1956 (plaintiffs' response to ¶7 of defendants' 9(g) statement).* This denial is unaccompanied by even a hint that it can be supported by any evidence.**

*This raw denial is squarely contradicted by the fact that the Rosenberg Children's Trust Fund reported no book income. (See Exhibits B-H , annexed hereto). The trust was terminated in 1968.

**Equally unsupported, as well as irrelevant, is plaintiffs' claim that a total of between 350,000 to 500,000 copies of Death House Letters were sold in several countries between 1953 and 1956.

The Defense of Fair Use is Available
When the Copied Material Consists of Letters

16. The moving affidavit cites many noted scholars and attaches as exhibits, excerpts from numerous histories and biographies conclusively demonstrating that "letters stand on the same footing as 'historical facts' which are the product of research and in turn form the basis for subsequent works" (Nizer affid. ¶17).*** However, even plaintiffs admit that letters themselves are "historical facts" (Perlin affid. ¶56). Consequently, the question proposed by Judge Tyler, as to whether letters stand on the same footing as other historical facts, is admittedly no longer an issue on this motion. Since it is the only question which Judge Tyler did not dispose of, on the theory that an opportunity ought to be given plaintiff to support its position factually, plaintiffs' concession on this point is tantamount to having Judge Tyler's ruling in favor of the defendants on this point as well as the other "issues".

(plaintiffs' 9(g) statement ¶6). Moreover, this statement is inconsistent with the only affidavit (Mr. Perlin's affidavit [¶14]) submitted in support of that statement, which puts the number of copies sold during that period at 400,000 - 450,000. That affidavit disclaims any factual basis for this assessment. Significantly, none of the five trustees of The Rosenberg Children's Trust Fund, the persons who would have such knowledge, have submitted any affidavit in support of any such contention.

***True to form, however, plaintiffs even deny that the xerox copies of pages of those books, annexed as exhibits 5 - 31 to the moving affidavit, are true copies of the originals. (See ¶12 of defendants' 9(g) statement denied in plaintiffs' response thereto).

Count II of the Supplemental Complaint
(Libel and Right of Privacy) Must Be Dismissed As Well

17. Judge Tyler in an extensive and lucid opinion has dismissed plaintiffs' cause of action for libel and invasion of the right of privacy. 381 F.Supp. 29. The charge was ludicrous on its face. Thus, this cause of action called Count II, which related to the hard cover edition of The Implosion Conspiracy was put to rest. The same charge, also called Count II, is nevertheless repeated by plaintiff in a supplemental complaint against the paperback edition of The Implosion Conspiracy. The hardback and paperback editions are identical. It follows that this Count should also be dismissed.*

Count III (for consequential damages)
Must Be Dismissed As Well

18. The motion to dismiss Count III is based on the fact

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* The answering affidavits totally ignore defendants' motion to dismiss Count II of the supplemental complaint. Plaintiffs argue that defendants have filed no 9(g) statement or affidavit in support of the motion to dismiss Count II and therefore, that the motion to dismiss is defective (plaintiffs' mem. p.2). This contention is untrue as well as frivolous. The moving affidavit (¶30) clearly sets forth the grounds upon which the motion to grant summary judgment dismissing Count II of the supplemental complaint is predicated. It is based on this Court's prior decision dismissing Count II of the complaint. This Court can take judicial notice of the decisions and pleadings in the case before it.

that it does not state an independent cause of action, but rather is entirely dependent upon Counts I and II. Consequently, if they are dismissed, Count III must also fall. Plaintiffs do not dispute this. Moreover, as predicted in the moving affidavit, plaintiffs have recently published many of the previously unpublished letters of their parents which are the subject of Count III in a book entitled We Are Your Sons. Therefore, it can hardly be seriously contended that The Implosion Conspiracy decreased the value of these unpublished letters, although that is precisely what plaintiffs allege in Count III.

The Injunction Restraining Further Copyright, Libel, or Invasion of Privacy Litigation Arising Out of The Implosion Conspiracy Should Be Granted

19. The need for an injunction enjoining further litigation is clearly set forth in the affidavit of Robert Callagy. Plaintiffs oppose such an injunction on the grounds that it can only be granted after a final judgment on the merits. If, however, as we believe, the instant motion for summary judgment is granted, that will constitute a final judgment on the merits and injunctive relief will be appropriate.

20. Indeed, plaintiffs' answering papers underscore the need for such relief. By denying that this Court's prior dismissal of Count II of the complaint for libel and invasion of privacy bars a subsequent lawsuit against defendants on the identical claim (pltfs. mem. p.2), plaintiffs acknowledge that elementary principles of res judicata and collateral estoppel will not dissuade them from instituting baseless and vexatious litigation. Only an injunction will.

Some Comments About The Irrelevant But Baseless Charges

21. Although the plaintiffs' attacks on the merit of defendants' book are irrelevant to this motion, I ask the Court's indulgence for some limited comments. Otherwise, the obvious malice and fanaticism which is evident in this litigation may exploit my silence in the future.

22. Some of the charges are too ridiculous to answer. Thus, someone who compares The Implosion Conspiracy to "Little Orphan Annie" (letter of Eugene Genovese dated February 17, 1975) discredits his own alleged expertise. Other statements made by plaintiffs' counsel are simply false. For example, while plaintiffs deny that I met with Rabbi Koslowe (Perlin affid. ¶36) the fact is that on August 7, 1972, Rabbi Koslowe came to my office at 477 Madison Avenue, and we discussed the Rosenberg case for over two hours. Mr. Perlin has previously examined my notes of this meeting, and so his carelessness and inaccuracy are again demonstrated.

23. Some of the other accusations made by plaintiffs are contradicted by the answering papers themselves. Thus, while a charge is made of lack of research, plaintiffs' counsel has listed at least thirteen different primary and secondary sources which I consulted (Perlin affidavit, ¶¶24, 25). Another of plaintiffs' affiants, Noam Chomsky, has credited me with consulting two others, S.A. Finebergs' The Rosenberg Case and a letter by

Harold Urey. Actually my research was far more comprehensive. I made thousands of notations in my handwriting of every word of the printed record of the trial and of the extensive appeals; read books, endless numbers of newpaper reports, commentaries, articles, editorials, etc., interviewed such witnesses as were alive that I could induce to cooperate and wrote more than a thousand pages of manuscript in handwriting. Thus, the handwritten manuscript and other notes which were still available have been produced and marked as exhibits on my deposition. The plaintiffs' carping about research is not only untenable but made ludicrous by their "supporting" affidavits which contradict each other and, in the course of which, my own research is borne out. So, for example, there is criticism because I acknowledge as one of the books I read on the Rosenbergs, The Book of Daniel, a work of fiction (e.g., affidavit of Walt A. Williams), yet Alvin Goldstein, whose television documentary is held forth as accurate, (Exhibit 17 to Mr. Perlin's affidavit) admits that he also used the very same book as part of his research on the Rosenberg case. On the one hand, bias is charged against me (affid. of Noam Chomsky) -- which I deny -- yet John Wexley, another of plaintiffs' affiants, the author of the so-called "definitive work" on the Rosenberg case, writes:

> "[I]t is impossible for this writer to pretend utter neutrality....'Nobody is entitled to be unbiased towards truth or falsehood.'" (Author's note to Judgment of Julius and Ethel Rosenberg)

Of course,this confession of bias is supposed to be leavened by what Mr. Wexley subjectively considers to be truth or falsehood. The alleged errors of fact contained in The Implosion Conspiracy, even if they existed, are trivial (whether Harry Gold was 3 or 14 when he came to the United States [Affid. of H.H. Wilson]), but more important,plaintiffs' affidavits to prove these alleged errors,at times confirm that they are not errors. For example, Morton Sobell in his affidavit (p.3) states that a meeting between defendants and counsel in the Rosenberg case, which I describe as having taken place after the sentencing, actually occurred after the verdict of the jury, but prior to sentencing. Yet, Mr. Wexley, allegedly based on interviews with Emanuel Bloch and Helen Sobell, states at page 618 of his book that the meeting did take place after sentencing. Thus one of plaintiffs' affiants confirms my statement, while another differs.

24. No work of biography or history has ever been immune from some critics' observations about a wrong date, place or more substantial difference of fact based on other scholars' works. Nobel and Pulitzer prize works, although recognized for scholarship and artistic merit, have nevertheless been subjected to such criticisms. Such classics as Sandburg's Lincoln, or Frankfurter's Sacco and Vanzetti, have been hailed as great artistic and historical achievements while at the same time they did not go unchallenged on factual reconstruction. No research of an ancient trial or historical event depends on perfection

for recognition, any more than any other human endeavor, particularly in the literary realm where interpretation and reconstruction of facts are an essential task, based on a mass of complex material. Certainly, the privilege of fair use of another's copyrightable material, frequently resorted to in such works, is not forfeited even if such criticism as is made in the instant case, was justified, which it is not.

25. Notwithstanding the comments of plaintiffs' affiants, The Implosion Conspiracy has been widely recognized as a historical work which should be read by all serious students of the Rosenberg case. Again, although irrelevant to the motion, the fact is that distinguished critics from leading newspapers and magazines and law reviews have paid tribute to it in these respects.

Professor Sharp's Review

26. Professor Malcolm Sharp of Chicago University was so impressed with the Rosenbergs' cause that he volunteered as counsel in the appeal stages of the case. Obviously, then, he was, and is, favorably disposed to their cause and more knowledgeable than any of the affiants who made opposing affidavits. Professor Sharp wrote a review of The Implosion Conspiracy, which appeared in the Chicago Daily News on January 27, 1973.

I quote from it:

> "Nizer has done what I would have considered unlikely; he has given life to the rather simple couple who were

executed 20 years ago. They did not have the striking qualities of Vanzetti or Sacco. Yet their characterization in this book is true to their steadfastness in their love for one another and their children and in their devotion to their faith in mankind."

* * *

"The book has some minor mistakes, some minor instances of imaginative reconstruction... Yet the effect of book...seems to me basically a true representation of character and action." (Emphasis added)

27. The book has been hailed for its accuracy and historical significance by other reviewers as well. For example, John Barkham of The Saturday Review Syndicate wrote:

"As one who followed the original trial in the Press when it occurred, I found the book incomparably more informative and instructive."

Similarly, Christopher Lehmann-Haupt of The New York Times wrote:

"[Nizer] meant 'to know every inch of the thousands of pages of the record...every word and authority in the briefs...every judicial opinion....every book written... every newspaper reference...and every person he could find who touched the Rosenbergs lives or deaths."

Having imposed upon the Court this section of the brief, despite its total irrelevance to the motion for summary judgment, I return to the true issue.

28. There is no issue to be tried. As had already been held by Judge Bonsal in another suit against The Implosion Conspiracy, the defense of fair use is applicable and summary judgment must be granted. (Gardner v. Nizer and Doubleday & Co.,

reply mem. Point II). Judge Bonsal did not even deem the objections raised by plaintiffs here, worthy of consideration, (reply mem. p.9). Other authorities support summary judgment in cases far less impressive. (reply mem. pp. 10-12). Where, as in the instant case, the alleged taking represents only .024 of the original work, the litigation is ludicrous and summary judgment is clearly warranted.

29. The defense of fair use clearly requires dismissal of Count I, for statutory copyright infringement. Count II for libel and invasion of privacy, already dismissed with respect to the hardback edition should be dismissed with respect to the soft-cover edition as well. Finally, Count III, which is merely a claim for consequential damage based on the wrongs alleged in Counts I and II cannot survive if the first two counts are dismissed.

Louis Nizer

LOUIS NIZER

Sworn to before me this
9th day of May, 1975.

Anne Marie DeSurrey

Notary Public

ANNE MARIE DeSURREY
Notary Public, State of New York
No. 31-6002155 Qual. in New York Co.
Commission Expires March 30, 1976

EXHIBIT A

WE ARE YOUR SONS by Michael Meeropol and
Robert Meeropol to be furnished upon request of the Court

EXHIBIT B

(Attached to foregoing Reply Affadavit of Louis Nizer)

THE ROSENBERG CHILDREN'S TRUST FUND

FINANCIAL REPORT

FOR THE FISCAL YEAR ENDED JUNE 30, 1958

LEWIS J. GRAHAM
CERTIFIED PUBLIC ACCOUNTANT
1841 BROADWAY
NEW YORK 23, N.Y.

A-528

LEWIS J. GRAHAM
CERTIFIED PUBLIC ACCOUNTANT
1841 BROADWAY
NEW YORK 23, N.Y.
CIRCLE 7-1451-1452

September 19, 1958

Board of Trustees
The Rosenberg Children's Trust Fund
320 Broadway, Room 607
New York, New York

Gentlemen:

We have audited the books and records of the Fund for the fiscal year ended June 30, 1958 and present herewith a financial report thereon, consisting of the following:

Exhibit "A" - Statement of Financial Conditon as of June 30, 1958

Exhibit "B" - Statement of Receipts and Disbursements for the fiscal year ended June 30, 1958

In our opinion the accompanying financial report presents fairly the financial position of the Fund as of June 30, 1958 and the results of its operations for the fiscal year then ended.

Respectfully submitted,

Lewis J. Graham

LEWIS J. GRAHAM

THE ROSENBERG CHILDREN'S TRUST FUND — EXHIBIT "A"

STATEMENT OF FINANCIAL CONDITION
AS OF JULY 30, 1958

A-529

Cash in Savings Banks:		
Lowery Savings Bank	$2,191.14	
East River Savings Bank	3,673.45	
Chase Manhattan Bank	676.40	
Emigrant Industrial Savings Bank	3,688.56	$10,229.55
Cash in Chase Manhattan Bank		1,067.17
Total Cash in Banks		11,296.72
Bonds (at cost):		
Star of Israel Bond - 3½% - Matures May 1, 1966	1,000.00	
U.S. Treasury Bonds:		
1958 - 2 3/8% - $ 5,000.00	* 4,999.47	
1960 - 2 1/8% - 15,000.00	14,757.99	
1962 - 2 1/4% - 10,000.00	9,782.74	
Total Bonds		30,540.20
Net Worth of Fund:		
Balance as of July 1, 1957	43,706.00	
Less: Excess of Disbursements over Receipts for the fiscal year ended June 30, 1958 (Exhibit "B")	1,869.08	
BALANCE AS OF JUNE 30, 1958		$41,836.92

* Matured June 15, 1958; redeemed August 1, 1958 for $5,059.35.

THE ROSENBERG CHILDREN'S TRUST FUND

EXHIBIT "P"

STATEMENT OF RECEIPTS AND DISBURSEMENTS
FOR THE FISCAL YEAR ENDED JUNE 30, 1958

A-530

RECEIPTS:		
Interest Income:		
U.S. Treasury Bonds	$ 603.14	
Star of Israel Bond	35.00	
Saving Banks	404.10	$1,042.24
Royalties - Sharp Book		621.65
Refund of Personal Income Taxes - 1957	408.00	
Less: Payments therein	274.00	134.00
Total Receipts		1,797.89
DISBURSEMENTS:		
Board and Maintenance of Children	3,600.00	
Audit	50.00	
Photostats	14.35	
N.Y. State Fiduciary Income Tax - Fiscal year ended June 30, 1957	2.62	
Total Disbursements		3,666.97
EXCESS OF DISBURSEMENTS OVER RECEIPTS		$1,869.08

EXHIBIT C

(Attached to foregoing Reply Affadavit of Louis Nizer) A-531

The Rosenberg Children's Trust Fund

Fiduciary Income Tax Return Fiscal Year ended June 30, 1959

FORM 1041

U. S. Treasury Department
Internal Revenue Service

U. S. FIDUCIARY INCOME TAX RETURN

(FOR ESTATES AND TRUSTS)
FOR CALENDAR YEAR

or other taxable year beginning 1958,
and ending ..... 19..

1959

Do not write in space below

PLEASE TYPE OR PRINT PLAINLY

Name of Estate or Trust. Check Whether Estate ☐, Simple Trust ☐, Complex Trust ☐

The Rosenberg Children's Trust Fund

Name, Address, and Title of Fiduciary

c/o Gloria Agrin
320 Broadway, New York, N.Y.

COPY

Simple trusts are not required to fill in the schedules on page 4. They need complete only the lines and schedules on pages 1, 2, and 3 that apply to them. See page 2 of instructions.

Line and Instruction No.	INCOME		
1.	Dividends (Enter full amount before exclusion)	502.32	
2.	Interest on bank deposits, notes, corporation bonds, etc.		
3.	Interest on tax-free covenant bonds upon which a Federal income tax was paid at source	[illegible]	
4.	Interest on Government obligations, etc.		
5.	Income from partnerships and other fiduciaries (See Instruction 5)		
	Name and address		
6.	Gross rents and royalties	176.04	
7.	Gross profit (or loss) from trade or business		
8.	(a) Net gain (or loss) from sale or exchange of property other than capital assets (from line 2, Schedule D)		
	(b) Net gain (or loss) from sale or exchange of capital assets (from line 12, Schedule D)		
9.	Other income (State nature of income)		
10.	Total income (lines 1 to 9, inclusive)		1,259.59
	DEDUCTIONS		
11.	Interest (Explain in Schedule A)		
12.	Taxes (Explain in Schedule A)		
13.	Fiduciary's portion of depreciation (Schedule B) and depletion. Explain depletion		
14.	Charitable deduction (line 9, Schedule F)		
15.	Other deductions authorized by law (Explain in Schedule A) Accountant fees	35.00	
16.	Total (line 11 to line 15, inclusive)		35.00
17.	Line 10 minus line 16 (Complex trusts and estates enter this amount on line 1 in Schedule G, also)		[illegible]
18.	Deduction for distributions to beneficiaries	[illegible]	
19.	Adjustment of dividend exclusion (not to exceed $50) (See Instruction 19)		
20.	Federal estate tax attributable to income in respect of a decedent (Fiduciary's share)		
21.	Long-term capital gain deduction. Enter 50% of line 13 (c), Schedule D		
22.	Exemption ($600 for an estate; trusts see instructions)	100.00	
23.	Total (lines 18 to 22, inclusive)		[illegible]
24.	Taxable income of fiduciary (line 17 minus line 23)	[illegible]	[illegible]
	COMPUTATION OF TAX		
25.	Tax on amount on line 24 (See Tax Rate Schedule in Instruction 25)		[illegible]
26.	If alternative tax is applicable, enter the tax from line 19, Schedule D		
27.	Fiduciary's share of foreign tax credit (Attach Form 1116)		
28.	Fiduciary's share of credit for tax paid at source on tax-free covenant bond interest		
29.	Tax previously paid, or withheld (See Instruction 29 and attach explanation)		
30.	Fiduciary's share of dividends received credit (line 7, Schedule E)		
31.	Fiduciary's share of credit for partially tax-exempt interest		
32.	Credit for tax deemed paid on undistributed capital gains of regulated investment companies		
33.	Total of lines 27 to 32, inclusive		

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and, to the best of my knowledge and belief, is a true, correct, and complete return.

..... (Signature of fiduciary or officer representing fiduciary) ..... (Title) ..... (Date)

I declare under the penalties of perjury that I prepared this return for the fiduciary named herein and that this return (including any accompanying schedules and statements) is, to the best of my knowledge and belief, a true, correct, and complete return based on all the information relating to the matters required to be reported in this return of which I have any knowledge.

..... (Individual or firm signature) ..... (Address) ..... (Date)

Line No.	Explanation	Amount	Line No.	Explanation	Amount

Schedule B.—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 34)

1. Kind of property (if buildings, state material of which constructed). Exclude land and other nondepreciable property.	2. Date acquired	3. Cost or other basis	4. Depreciation allowed (or allowable) in prior years	5. Method of computing depreciation	6. Rate (%) or life (years)	7. Depreciation for this year
1.						

2. Total depreciation

3. Total fiduciary's portion. Enter here and on line 13, page 1

Schedule C.—BENEFICIARIES' SHARES OF INCOME AND CREDITS (Estates and complex trusts, see Instruction 35)

1. Name of each beneficiary (Designate nonresident aliens, if any)	2. Address
(a) Michael Alan Emanuel	c/o Claria Amin – 340 Broadway, N.Y.C.
(b) Robert Harry Emanuel	" " " " " "
(c)	
(d)	

Continuation of Schedule C

	3. Amount of income required to be distributed currently	4. Other amounts paid, credited, or otherwise required to be distributed	5. Domestic dividends qualifying for credit	6. Partially tax-exempt interest included in amount on line 4, page 1	7. Income taxable to beneficiaries less portion reportable in cols. 5, 6, 8, 9 and 10
(a)					522.21
(b)					522.21
(c)					
(d)					
Totals			(See other attached)		1,044.42

Continuation of Schedule C

	8. Net short-term capital gain	9. Net long-term capital gain (100%)	10. Tax-exempt income, and foreign income of a foreign trust (enter total only)	11. Federal income tax paid at source (See line 3, page 1, less line 28, page 1)	12. Income and profits taxes paid to a foreign country or United States possession	13. Depreciation and depletion
(a)						
(b)						
(c)						
(d)						
Totals						

ADDITIONAL INFORMATION REQUIRED

1. Was an income tax return (Form 1041) filed for the preceding year? ☐ Yes ☐ No.
If answer is "Yes," to which District Director's office was it sent? Lower Manhattan, N.Y.

2. [illegible]

3. If copy of will or trust instrument and statement required under General Instruction "H" have been previously furnished, do not file again but enter date and place where filed.
[illegible] Manhattan
Lower Manhattan, N.Y. District

4. If you had tax-exempt income, have you deducted only that portion of expenses allocable to taxable income? ☐ Yes ☐ No

5. If return is for a trust, enter name and address of grantor

6. If return is for an estate, has a United States Estate Tax Return been filed? ☐ Yes ☐ No.

If answer is "No," will such a return be filed?
☐ Yes ☐ No ☐ Uncertain

THE ROSENBERG CHILDREN'S TRUST FUND
c/o Gloria Agrin - 320 Broadway, N.Y.C.

RIDER ATTACHED TO FIDUCIARY INCOME TAX RETURN
FISCAL YEAR ENDED JUNE 30, 1959

Under the terms of the trust indenture the beneficiaries, two minors, received the following distributions from the trust.

Out of Income (P. 1 Line 17)	$1,124.49
Out of Corpus	2,493.51
Total Distribution (P. 1 Line 18)	$3,618.00

Simple trusts not having entries on this page may tear off pages 3 and 4 and file only pages 1 and 2

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY (See Instruction 36)

(I) PROPERTY OTHER THAN CAPITAL ASSETS

a. Kind of property (if necessary, attach statement of descriptive details not shown below)	b. Date acquired Mo. Day Yr.	c. Date sold Mo. Day	d. Gross sales price (contract price)	e. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	f. Cost or other basis and cost of subsequent improvements (if not purchased, attach explanation)	g. Expense of sale	h. Gain or loss (column d plus column e less sum of columns f and g)
1.							
							A-534

2. Net gain (or loss). Enter here and on line 8 (a), page 1 .....

(II) CAPITAL ASSETS

Short-Term Capital Gains and Losses—Assets Held Not More Than 6 Months

3.							

4. Enter your share of net short-term gain (or loss) from partnerships and other fiduciaries .....
5. Enter unused capital loss carryover from 5 preceding taxable years (Attach statement) .....
6. Net short-term gain (or loss) from lines 3, 4, and 5. Enter here and on line 10 below .....

Long-Term Capital Gains and Losses—Assets Held More Than 6 Months

7.							

8. Enter the full amount of your share of net long-term gain (or loss) from partnerships and other fiduciaries .....
9. Net long-term gain (or loss) from lines 7 and 8. Enter here and on line 11 below .....

CAPITAL GAINS AND LOSSES

	1. Beneficiaries	2. Fiduciary	3. Total
10. Net short-term gain or loss from line 6, above			
11. Net long-term gain or loss from line 9, above			
12. Total net gain or loss			

Enter on line 8 (b), page 1, the net gain shown on line 12, column 3, above. If net loss on line 12, column 3, above, enter as loss on line 8 (b), page 1, whichever of the following is the smallest amount: (i) the amount of the loss, (ii) taxable income computed without regard to capital gains and losses and the deduction for personal exemption, or (iii) $1,000.

COMPUTATION OF FIDUCIARY'S CAPITAL GAINS DEDUCTION

13. (a) Long-term capital gain shown on line 11, column 3, above .....
(b) Short-term capital loss shown on line 10, column 3, above .....
(c) Excess of line 13 (a) over line 13 (b), above .....
(d) Long-term capital gains taxable to beneficiaries. (Total of column 9, Schedule C) .....
(e) Balance (line 13 (c) minus line 13 (d)). (Enter 50% of this amount on line 21, page 1) .....

COMPUTATION OF ALTERNATIVE TAX

If fiduciary had a net long-term capital gain or an excess of net long-term capital gain over net short-term capital loss shown in column 2, line 12, above, and line 24, page 1, exceeds $18,000, he may find it to his advantage to make the alternative tax computation.

14. Income from line 24, page 1 .....
15. 50% of amount on line 13 (e), above .....
16. Balance (line 14 minus line 15) .....
17. Tax on amount on line 16 (See Tax Rate Schedule in Instruction 25) .....
18. 50% of amount on line 15, above .....
19. Alternative tax (line 17 plus line 18); if less than line 25, page 1, enter this amount on line 26, page 1 .....

Schedule E.—FIDUCIARY'S SHARE OF DIVIDEND CREDIT (See Instruction 37)

1. Total domestic corporation dividends qualifying under section 34, before dividend exclusion .....
2. Beneficiaries' share of dividends from column 5, Schedule C .....
3. Adjustment of dividend exclusion for 1958 (line 19, page 1) .....
4. Total (line 2 plus line 3) .....
5. .....
6. Enter: (a) 4% of line 5 .....
(b) Tax shown on line 25 or 26, page 1, less amount on line 27, page 1 .....
(c) 4% of line 24, page 1 .....
7. Enter here and on line 30, page 1, the smallest of the amounts on lines 6 (a), 6 (b) and 6 (c) above .....

Schedule F.—COMPUTATION OF CHARITABLE DEDUCTION (See Instruction 38)

(Submit statement giving name and address of charitable organization)

A-535

1. Amounts paid or permanently set aside for charitable purposes from current year's income		
2. Tax-exempt interest and foreign income of a foreign trust allocable to charitable distribution. (Complete lines 3 and 4 below only if gain on line 11, column 2, Schedule D, exceeds loss on line 10, column 2, Schedule D)		
3. (a) Long-term capital gain included on line 1 (Do not complete lines (b) and (c) if such amounts are greater than line (a))		
(b) Enter gain on line 11, column 2, Schedule D, minus loss on line 10, column 2, Schedule D		
(c) Enter gain on line 11, column 3, Schedule D, minus loss on line 10, column 3, Schedule D		
4. Enter 50% of line 3 (a), line 3 (b), or line 3 (c), whichever is smallest		
5. Enter sum of line 2 and line 4		
6. Balance (line 1 minus line 5)		
7. Enter short-term capital gains and 50% of the long-term capital gains of the current taxable year allocable to corpus, paid or permanently set aside for charitable purposes		
8. Amounts paid or permanently set aside for charitable purposes other than from income of the current year		
9. Total (line 6 plus lines 7 and 8). Enter here and on line 14, page 1		

Schedule G.—COMPUTATION OF DISTRIBUTABLE NET INCOME (See Instruction 39)

1. Enter amount from line 17, page 1	
2. Add: (a) Tax-exempt interest (as adjusted)	
(b) Foreign income of a foreign trust (as adjusted)	
(c) Net gain shown on line 12, column 1, Schedule D. If net loss, enter zero	
(d) Lines 4 and 7, Schedule F	
(e) Short-term capital gain included on line 1, Schedule F	
(f) If amount on line 8 (b), page 1, is a loss, enter amount here	
3. Total (line 1 through line 2 (f))	
4. If amount on line 8 (b), page 1, is a gain, enter amount here	
5. Distributable net income (line 3 minus line 4)	

Schedule H.—COMPUTATION OF DISTRIBUTIONS DEDUCTION (See Instruction 40)

1. Total of columns 3 and 4 of Schedule C	
2. Enter the total of column 10, Schedule C	
3. Balance (line 1 minus line 2)	
4. Enter distributable net income (line 5, Schedule G)	
5. Enter the total of lines 2 (a) and 2 (b) of Schedule G	
6. Balance (line 4 minus line 5)	
7. Distributions deduction. (Enter here and on line 18, page 1, the lesser of line 3 or line 6 above)	

During the taxable year did you make an accumulation distribution as defined in Sec. 665(b)? See General Instruction Q.

☐ Yes ☐ No. If "Yes," attach Schedule J (Form 1041).

☆ U.S. GOVERNMENT PRINTING OFFICE : 1951—O—471480

EXHIBIT D
(Attached to foregoing Reply Affadavit of Louis Nizer)

THE ROSENBERG CHILDREN'S TRUST FUND

FINANCIAL REPORT

FOR THE FISCAL YEAR ENDED JUNE 30, 1960

LEWIS J. GRAHAM
CERTIFIED PUBLIC ACCOUNTANT
1841 BROADWAY
NEW YORK 23, N.Y.

LEWIS J. GRAHAM
CERTIFIED PUBLIC ACCOUNTANT
1841 BROADWAY
NEW YORK 23, N.Y.
CIRCLE 7-1451-1452

A-537

September 1, 1960

Board of Trustees
The Rosenberg Children's Trust Fund
320 Broadway, Room 607
New York, New York

Gentlemen:

We have audited the books and records of the Fund for the fiscal year ended June 30, 1960 and present herewith a financial report thereon, consisting of the following:

Exhibit "A" - Statement of Financial Condition as of June 30, 1960

Exhibit "B" - Statement of Receipts and Disbursements for the fiscal year ended June 30, 1960

In our opinion the accompanying financial report presents fairly the financial position of the Fund asof June 30, 1960 and the results of its operations for the fiscal year then ended.

Respectfully submitted,

Lewis J. Graham

LEWIS J. GRAHAM

THE ROSENBERG CHILDREN'S TRUST FUND

EXHIBIT "A"

STATEMENT OF FINANCIAL CONDITION
AS OF JUNE 30, 1960

A-538

Cash in Chase Manhattan Bank		$ 531.75
Cash in Savings Bank Accounts:		
East River Savings Bank	$ 2,402.10	
Chase Manhattan Bank	90.53	
Emigrant Industrial Savings Bank	8,201.06	10,693.69
Total Cash in Banks		11,225.44
Bonds (At Cost):		
State of Israel Bond - 3 1/2% - $1,000.00 - Matures May 1, 1966	1,000.00	
U.S. Treasury Bonds - 2 1/8% - $15,000.00 - Matures November 15, 1960	14,757.99	
2 1/4% - $10,000.00 - Matures December 15, 1965	9,782.74	
Total Bonds		25,540.73
Net Worth of Fund:		
Balance as of July 1, 1959	39,343.41	
Less: Excess of Disbursements over Receipts for the fiscal year ended June 30, 1960 (Exhibit "B")	2,577.24	
BALANCE AS OF JUNE 30, 1960		$36,766.17

THE ROSENBERG CHILDREN'S TRUST FUND

STATEMENT OF RECEIPTS AND DISBURSEMENTS FOR THE FISCAL YEAR ENDED JUNE 30, 1956

EXHIBIT "B"

A-539

Receipts:		
Interest Income:		
U.S. Treasury Bonds	$ 543.76	
Star of Israel Bond	35.00	
Savings Banks	403.69	$ 982.45
Royalties - Sharp Book		75.31
Total Receipts		1,057.76
Disbursements:		
Board and Maintenance of Children	3,600.00	
Audit	35.00	3,635.00
EXCESS OF DISBURSEMENTS OVER RECEIPTS		$2,577.24

EXHIBIT E
(Attached to foregoing Reply Affadavit of Louis Nizer)

THE ROSENBERG CHILDREN'S TRUST FUND

FINANCIAL REPORT

FOR THE FISCAL YEAR ENDED JUNE 30, 1961

LEWIS J. GRAHAM
CERTIFIED PUBLIC ACCOUNTANT
1841 BROADWAY
NEW YORK 23, N.Y.

LEWIS J. GRAHAM
CERTIFIED PUBLIC ACCOUNTANT
1841 BROADWAY
NEW YORK 23, N.Y.
CIRCLE 7-1451-1452

A-541

November 13, 1961

Board of Trustees
The Rosenberg Children's Trust Fund
320 Broadway, Room 607
New York, New York

Gentlemen:

We have audited the books and records of the Fund for the fiscal year ended June 30, 1961 and present herewith a financial report thereon, consisting of the following:

Exhibit "A" - Statement of Financial Condition as of June 30, 1961

Exhibit "B" - Statement of Receipts and Disbursements for the fiscal year ended June 30, 1961

In our opinion the accompanying financial report presents fairly the financial position of the Fund as of June 30, 1961 and the results of its operations for the fiscal year then ended.

Respectfully submitted,

Lewis J. Graham

LEWIS J. GRAHAM

THE PRESIDENT [illegible] FIRST FUND

STATEMENT OF FINANCIAL CONDITION
As of June 30, 1961

EXHIBIT "A"

A-542

Cash in Chase Manhattan Bank:		$ 1,568.70
Cash in Savings Bank Accounts:		
East River Savings Bank	$ 8,726.60	
Chase Manhattan Bank	2,592.60	
Bulgrent Industrial Savings Bank	8,372.51	19,691.71
Total Cash in Banks		21,260.41
Bonds (At Cost):		
Dbar of Israel Bond - 3½ - $1,000.00 - Matures May 1, 1966	1,000.00	
U.S. Treasury Bond - 2½ - $10,000.00 - Matures December 15, 1965	9,732.74	
Total Bonds		10,732.74
Net Worth of Fund:		
Balance as of July 1, 1960	36,706.17	
Less: Excess of Disbursements over Receipts for the fiscal year ended June 30, 1961 (Exhibit "B")	4,773.42	
BALANCE AS OF JUNE 30, 1961		$32,013.15

THE ROSEMARY CHILDREN'S TRUST FUND

STATEMENT OF RECEIPTS AND DISBURSEMENTS
FOR THE PERIOD [illegible]

EXHIBIT "B"

A-543

Receipts:		
U.S. Treasury Bond - 2 1/2% - Matured November 15, 1960	$15,000.00	
Less: Cost Thereof	14,757.99	
Interest Income upon Redemption		$ 242.01
Other Interest Income:		
U.S. Treasury Bonds		271.95
Savings Bonds		348.62
Total Receipts		862.58
Disbursements:		
Support and Maintenance - Robert Meerepol	2,800.00	
Support, Maintenance and Education - Michael Meerepol	3,700.00	
Total Support of Children	6,500.00	
Audit	35.00	6,535.00
EXCESS OF DISBURSEMENTS OVER RECEIPTS		$5,672.42

EXHIBIT F
(Attached to foregoing Reply Affadavit of Louis Nizer)

THE ROSENBERG CHILDREN'S TRUST FUND

FINANCIAL REPORT

FOR THE FOUR YEARS JULY 1, 1962 TO JUNE 30, 1966

LEWIS J. GRAHAM
CERTIFIED PUBLIC ACCOUNTANT

LEWIS J. GRAHAM
CERTIFIED PUBLIC ACCOUNTANT
1841 BROADWAY
NEW YORK 23, N.Y.
CIRCLE 7-1451-1452

A-545

January 5, 1967

Board of Trustees
The Rosenberg Children's Trust Fund
320 Broadway
New York, N.Y.

Gentlemen:

We have audited the books and records of the Fund for the four years July 1, 1962 to June 30, 1966 and present herewith a financial report thereon, consisting of the following:

Exhibit "A" - Statement of Financial Condition as of June 30, 1966

Exhibit "B" - Statement of Receipts and Disbursements for the four years July 1, 1962 to June 30, 1966

Respectfully submitted,

Lewis J. Graham

THE ROSENBERG CHILDREN'S TRUST FUND

STATEMENT OF FINANCIAL CONDITION
AS OF JUNE 30, 1956

EXHIBIT "A"

A-546

h in Chase Manhattan Bank		$ 491.20
h in Savings Bank Accounts:		
pat River Savings Bank	$10,600.15	
hase Manhattan Bank	55.38	
migrant Industrial Savings Bank	10,288.63	21,042.36
Total Cash in Banks		21,533.56
r of Iornal Bond - (Redeemed July 25, 1956)		1,000.00
t Worth of Fund:		
Balance as of July 1, 1952	28,851.58	
Less: Excess of Disbursements over Receipts for the four years July 1, 1952 - June 30, 1956 (Exhibit "B")	6,318.02	
BALANCE AS OF JUNE 30, 1956		$22,533.58

THE ROSENBERG CHILDREN'S TRUST FUND

STATEMENT OF RECEIPTS AND DISBURSEMENTS
FOR THE FOUR YEARS JULY 1, 1962 TO JUNE 30, 1966

A-547

EXHIBIT "B"

Receipts:

Interest Income - Savings Banks			$3,252.22
Redemption of U.S. Treasury Bonds -	Proceeds	$10,112.50	
	Cost	9,762.74	349.76
Total Receipts			3,601.98

Disbursements:

	Robert Rosenthal	Michael Rosenthal	Total	
Support and Maintenance:				
Fiscal Year Ended-June 30, 1963	$1,650.00	$2,500.00	$4,150.00	
June 30, 1964	1,650.00	1,250.00	2,900.00	
June 30, 1965	1,350.00		1,350.00	
June 30, 1966	1,500.00		1,500.00	
	6,150.00	3,750.00		9,900.00

EXCESS OF DISBURSEMENTS OVER RECEIPTS $6,318.02

EXHIBIT G
(Attached to foregoing Reply Affadavit of Louis Nizer)

THE ROSENBERG CHILDREN'S TRUST FUND

FINANCIAL REPORT

FOR THE FISCAL YEAR ENDED JUNE 30, 1967

LEWIS J. GRAHAM
CERTIFIED PUBLIC ACCOUNTANT

LEWIS J. GRAHAM
CERTIFIED PUBLIC ACCOUNTANT
1841 BROADWAY
NEW YORK 23, N.Y.
CIRCLE 7-1451-1452

A-549

October 24, 1967

Board of Trustees
The Rosenberg Children's Trust Fund
c/o Gloria Agrin
30 East 9 Street
New York, N.Y. 10003

Gentlemen:

We have audited the books and records of the Fund for the fiscal year ended June 30, 1967 and present herewith a financial report thereon, consisting of the following:

Exhibit "A" - Statement of Financial Condition as of June 30, 1967

Exhibit "B" - Statement of Income and Disbursements for the fiscal year ended June 30, 1967

Respectfully submitted,

Lewis J. Graham

THE ROSENBERG CHILDREN'S TRUST FUND

STATEMENT OF FINANCIAL CONDITION
AS OF JUNE 30, 1967

A-550

EXHIBIT "A"

Cash in Chase Manhattan Bank		$ 420.71
Cash in Savings Banks:		
Chase Manhattan Bank	$ 3,616.48	
Emigrant Industrial Savings Bank	14,407.88	18,024.36
TOTAL CASH IN BANKS		$18,445.07

Net Worth of Fund:		
Balance as of July 1, 1967	$22,533.56	
Less: Excess of Disbursements over Receipts for the fiscal year ended June 30, 1967 (Exhibit "B")	4,088.49	
BALANCE AS OF JUNE 30, 1967		$18,445.07

THE ROSENBERG CHILDREN'S TRUST FUND

STATEMENT OF INCOME AND DISBURSEMENTS
FOR THE FISCAL YEAR ENDED JUNE 30, 1967

A-551
EXHIBIT "B"

Income:		
Interest Income - Savings Banks		$ 939.01
Israel Bond		157.50
		1,096.51
Disbursements:		
Support and Maintenance		
College Education - Robert		
for the academic years 1965-66, and 1966-67	$5,000.00	
Accounting	105.00	
Total Disbursements		5,105.00
EXCESS OF DISBURSEMENTS OVER RECEIPTS		$4,088.49

EXHIBIT H
(Attached to foregoing Reply Affadavit of Louis Nizer) A-552

Letter from Certified Public Accountant to
Board of Trustees Children's Trust Fund dated October 10, 1968

LEWIS J. GRAHAM
CERTIFIED PUBLIC ACCOUNTANT
1841 BROADWAY
NEW YORK 23, N.Y.
CIRCLE 7-1451-1452

October 10, 1968

Board of Trustees
The Rosenberg Children's Trust Fund
% Gloria Agrin
30 East 9 Street

Gentlemen:

The trust was terminated June 20, 1968. Final distributions were made to the beneficiaries.

Cash in Banks:		
Balance - July 1, 1968		$18,445.07
Less: Excess of Disbursements over Receipts for the fiscal year ended June 30, 1968 (See Below *)		4,567.23
BALANCE AVAILABLE FOR DISTRIBUTION		$13,877.72
Final Distribution - June 20, 1968:		
Robert Meeropol	$6,938.89	
Michael Meeropol	6,938.90	$13,877.79
* Interest Income		$ 582.72
Accounting Fee	$ 150.00	
College Education - Robert (For the Academic Years 1967-1968, 1968-1969)	5,000.00	5,150.00
EXCESS OF DISBURSEMENTS OVER RECEIPTS		$4,567.28

Lewis J. Graham

SURREPLY AFFIDAVIT OF MARSHALL PERLIN SWORN TO MAY 21, 1975

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

- -X

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Plaintiffs,

73 Civ. 2720 (LPG)

-against-

LOUIS NIZER, DOUBLEDAY & COMPANY, INC., and FAWCETT PUBLICATIONS, INC.,

PLAINTIFFS' SURREPLY AFFIDAVIT

Defendants.

- -X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARSHALL PERLIN, being duly sworn, deposes and says:

1. I submit this affidavit in response to the reply affidavit of Louis Nizer, sworn to on the 9th day of May, 1975 and received by me on the 14th day of May, 1975.

2. Defendant Nizer premises his reply affidavit upon an erroneous and simplistic characterization of the plaintiffs' position that the defense of fair use can never be available to an infringing author if there are any factual

errors in his work or if the work is non-fictional in nature. Having thus created a straw man, he concludes that the affidavits of plaintiff in opposition to his motion are irrelevant and that the numerous affidavits submitted by historians and other scholars are merely distorted writings by "fanatical voices" (¶5, Nizer affidavit). Defendants resort to name calling cannot hide the fact that plaintiffs' affidavits in opposition are factually material and relevant and refute the defendants' claim that they are entitled to invoke the doctrine of fair use as a defense for their having infringed upon and misappropriated plaintiffs' copyrighted property.

3. The defendants' motion was premised upon the fact that they had written and published a scholarly work which would serve as a "reasonably valuable source material for future historians, biographers and social scientists" and because the infringing work was such a historical and biographical writing they were entitled to appropriate plaintiffs' copyrighted material without consent. The affidavits in opposition establish that the defendants' claim has no basis in fact; lacks all the attributes of a work which would entitle them to invoke such a defense; that THE IMPLOSION CONSPIRACY not only fails to contribute to knowledge, but that it is a highly inaccurate, flawed and fictitious work

derived, except for the trial record, from other secondary and tertiary sources. Plaintiffs' affidavits establish that the author falsely and inaccurately portrays what had actually occured in the courtroom and misstates the record of the trial itself. Further, in appropriating the plaintiffs' property, the defendants so misuse and distort these writings as to falsely portray their meaning and significance. These affidavits establish that the representations made by the author regarding the completeness, authenticity and accuracy of THE IMPLOSION CONSPIRACY were false. (See Perlin affidavit, ¶21, pp. 10-11) The misstatements of fact, the fictitious writings and the distortions of the trial record were not minor or inadvertent errors; they were grossly inaccurate and intentionally misleading.

4. The doctrine of fair use is a judge made privilege based on principles of reasonableness, fairness and equity which may be invoked only if certain standards, criteria and prerequisites are met whether the work be fictional, non-fictional or otherwise. The very multiplicity of factors which must be considered in each case based upon the unique factual circumstances are such as to preclude, except in the rare and unusual case, not present here, any determination of the issue by summary judgment. To invoke this doctrine of fairness and reasonableness, the party must come into court

with clean hands, otherwise it may not sustain such a defense in the face of the blatant infringement by verbatim copying of the copyrighted material. It would constitute a gross misuse of the privilege of fair use to permit the defendants to invoke that doctrine in light of the showing made by plaintiffs in their opposing affidavits.

The Nature and Extent of the Taking

5. The defendants acknowledge that they had copied verbatim approximately 2,000 words of the copyrighted material. It is not disputed that the Rosenberg letters of June 16 and June 19,1953 were not covered by the copyright obtained by the copyright owner at that time.* We further assume that these two letters, for the purpose of this motion, are not entitled to copyright protection. The defendants refuse to accept the fact in applying the criteria and standards of fair use that it is not merely the quantum of the appropriation but the quality of the appropriation. Defendants

* ¶4 of plaintiffs' 9(g) Statement inadvertently contained a typographical error. Line 4 thereof should read as follows: "1953, not including letters dated June 16,1953 from the"

The omission of the word "not" was inadvertent. It nevertheless should be noted that the British copyrighted edition of DEATH HOUSE LETTERS entitled THE ROSENBERG LETTERS, from which defendants copied, does include the letters of June 16 and June 19,1953.

Plaintiffs' responses to paragraphs 9 and 10 of defendants' 9(g) Statement are both correct and appropriate.

do not refuse the plaintiffs' affidavits which establish that the copyrighted material was an integral part of the infringing work upon which the defendants relied to promote the sale of their book and attempt to establish its authenticity in the eyes of the reader. Equally, defendants do not deny the plaintiffs showing as to how the defendants misused and distorted the copyrighted material both chronologically and substantively in infringing thereon by verbatim copying. While the 1,058 words encompassed in the letters of June 16 and June 19,1953 may not have constituted a copyright infringement, their use along with the copyrighted material serves to demonstrate both the quality and quantity of the unlawful taking and use.

6. Defendants' attempt to dispose of the Olney affidavit (see ¶9 of Nizer affidavit) by characterizing it as "meritless" in that Mr. Olney does not cite legal authority and tenders no affidavit in opposition either from Doubleday, Fawcett or any other publisher, as indeed defendants cannot. In the deposition in this action of Kenneth D. McCormick, the editor of THE IMPLOSION CONSPIRACY, and an employee of Doubleday, he acknowledged that the use of letters would not be permitted without the copyright owner's consent. He was under the mistaken impression, given to him by Nizer, that

there was oral consent given by Gloria Josephson. (See pp. 80-83 of McCormick deposition). This Gloria Josephson denied by affidavit in this action.* As a last resort defendants seek to argue that Judge Tyler in denying the temporary injunction found that the amount of the infringement, quantitatively made up a very small portion of the infringing work. This neither refutes the Olney affidavit, nor constitutes any judicial sanction for the quantity of the infringement or a determination of the quality and scope of the misappropriation. The defendants' position becomes entirely untenable when it is noted that when they used the copyrighted letter of Ethel Rosenberg, which in turn quoted from Shaw's ST. JOAN, they failed to get the plaintiffs' con-

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* In the opinion of Judge Tyler of July 18,1973, in responding to the defendants' contention, he stated:

> "Defendant Nizer, moreover, is a lawyer; he knew about Death House Letters and its copyright, yet made only one somewhat ambiguous attempt to obtain permission to cite the letters in his book."

And further the Court referred to Doubleday's publication of Invitation to an Inquest and stated:

> "In the original version of that book, excerpts of certain of the Rosenberg letters appeared; but there is evidence that Doubleday would not permit such use unless written consent was obtained. Thus it would seem that both defendants were well aware of the potential copyright infringement represented by quotations of the letters in The Implosion Conspiracy."

sent, but at the same time obtained consent from the Shaw estate.**

7. In paragraphs 10 and 11 of the Niser reply affidavit, the defendant states that he had license to use the copyrighted material "to explain or illustrate the historical development of the subject matter", and quotes from Judge Tyler's opinion denying defendants' prior motion to dismiss on the rationale that THE IMPLOSION CONSPIRACY was "valuable source material for future historians, biographers and social scientists", and that "defendants are likely to prove" the need to resort to quotations of certain of the Rosenberg letters.

8. The plaintiffs' answering affidavits establish : the defendant's book is not a "valuable source material". ite to the contrary. No evidence has been tendered by the defendants, and surely not evidence that could resolve that claim by summary judgment to establish that it was necessary for the defendants to quote verbatim from the copyrighted letters. Any competent historian could have extracted the information contained in the letters and commented thereon without resort to verbatim copying. The requisite respect for the plaintiffs' copy-

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** See back of Title Page of The Implosion Conspiracy, and p. 439; see Exhibit A attached hereto.

right interest pose no deterrent or obstacle to the dissemination of information in the public interest.

9. The defendants in their initial moving papers and in the Nizer reply affidavit argue that, since there was no extensive sale or publication of DEATH HOUSE LETTERS or income therefrom after 1956, this in some way gave them license to infringe the copyright, that no damage was done to plaintiffs' property, and in any event the infringement served to enhance the notoriety of the Rosenberg letters. We put aside the damage caused by the misuse of the copyrighted letters by the defendants. That is a matter that can only be determined at a trial. But now the defendants argue in their reply affidavit that the fact that the letters were published in countries throughout the world and that hundreds of thousands of copies of the letters were published is legally irrelevant. Their rationale for such a conclusion is not set forth. They further contradict themselves by acknowledging that the letters were of high literary quality and that the plaintiffs have recently published a book containing some of their parents' copyrighted and previously unpublished letters. Now defendants seek to avoid their culpability and liability by claiming credit

for the plaintiffs' publication of their book and plaintiffs' inclusion of their parents' letters. The fact that a wrong-doer by the nature of his deeds focuses attention upon the owner of stolen property, hardly serves as a defense to the wrong-doing, the piracy of another person's property.

The Letters and Fair Use

10. In paragraph 56 of my affidavit, I state "A letter of anyone is 'a historical fact'." From this defendants conclude that letters stand on the same footing of all other historical fact and hence is not entitled to copyright protection. The absurdity of their position is apparent and defendants choose to ignore some material facts and the like. The letters of our first President, George Washington, is "a historical fact". That did not deprive those letters of copyright protection in the face of a defense of fair use. That was decided in Folsom v Marsh 9 Fed. Cas. 342(1841). As stated by Justice Story,

> "In the first place I hold that the author of any letters (and his representatives) whether they are literary compositions or familiar letters, or letters of business, possess the sole and exclusive copyright therein."

In explaining why such "historical facts" were entitled to copyright protection, Justice Story stated further,

> "Indeed, if the doctrin were otherwise, that no person or his representatives could have a copyright in his own private or familiar letters, written to friends, upon interesting political and other occasions or containing details of fact and occurrences, passing before the writer, it would operate as a great discouragement upon the collection and preservation thereof; and the materials of history would become far more scanty, then they otherwise would be." *

It is no accident that the defendants have been unable to cite a single legal authority to support their contention that a letter is the sort of "historical fact" entitled to no or limited copyright protection.

The Defendants' Response to the
Plaintiffs' Affidavits in Opposition

11. Defendants seek to avoid plaintiffs' substantial factual showing that there are many issues of fact that must be resolved, and preclude the granting of defendants' motion for summary judgment. Defendants studiously avoid the detailed specifications in the plaintiffs' affidavits, supported by scholars and historians of established competence and expertise. Rather, the Nizer affidavit resorts once again to mis-characterization, name calling, and false charges of "malice and fanaticism" and finally concludes that the charges "are too ridiculous to answer."

*See affidavits of historians submitted by plaintiffs directed to this very point.

12. After claiming that his research "was far more comprehensive", Mr. Nizer states that he "interviewed such witnesses as were alive that I could induce to cooperate." (Nizer affidavit, p. 12). This statement is plainly and simply untrue. The defendant-author did not attempt to, or even ask to speak with or interview Morton Sobell, Helen Sobell, Ann Meeropol, Abel Meeropol, Ethel Goldberg, William Wolff, Emily Alman, as well as myself. No attempt was made to speak with the attorneys for the Greenglasses, the Elitchers, Harry Gold, or the witnesses from the Atomic Energy Commission Walter Koski or John Derry, and others too numerous to mention. (See letter and attachment of Alvin Goldstein, Exhibit 17 to Perlin affidavit).

13. In paragraph 36 of my affidavit, I stated that I had been informed by the plaintiffs, who met with Rabbi Koslowe, that the Rabbi stated that he did not meet with Mr. Nizer and that his conversation was over the phone. Mr. Nizer, in paragraph 22 of his affidavit,states that he met with Rabbi Koslowe at his office on August 7, 1972. I could not reach Rabbi Koslowe in that he was in the hospital at the time that I called. The plaintiffs', or Rabbi Koslowe's recollection, may be erroneous. Mr. Nizer's notes of his interview with Rabbi Koslowe are so sparse that they

easily could have been taken over the telephone. The lack of information contained in those notes would only serve to support the limited nature of the discussion directed almost completely to the day of execution and made up primarily of xerox copies of Psalms from the Bible and notations as to which Psalms may have been read. An examination of the Nizer book in any event indicates that that portion relating to the execution was lifted almost in toto from the Root and Wexley books.

14. In paragraph 24 of the Nizer reply affidavit, the defendant, without warrant, seeks to associate himself and his book with Nobel and Pulitzer Prize authors and works, or with such eminent scholars as Sandberg and Justice Frankfurter. I am afraid the combination is not miscible, and the attempt at association and comparison is overly pretentious and out of place. I bring to the Court's attention in addition to Mr. Justice Frankfurter's scholarly study of the Sacco and Vanzetti case, Frankfurter, Felix: THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN, Boston: Little Brown, March 1927. I also bring to the attention of the Court the scholarly work of G. Louis Joughin of the New School for Social Research, and Edward M. Morgan, a noted Professor of Law, at the

Harvard University Law School, entitled THE LEGACY OF SACCO AND VANZETTI, published by Harcourt Brace and Company, 1948. A perusal of that work, its accuracy and scholarly care; an examination of its appendices made up of acknowledgments, chapter references, bibliography and index puts to shame the defendant's product. It should also be noted that that book, published twenty-one years after the execution of Sacco and Vanzetti, to a very limited extent quotes from letters of Sacco and Vanzetti but those quotations were only used after the author obtained the written consent of the copyright owners or archival custodians.

15. The Nizer affidavit states that the defendant's work has been "widely recognized as a historical work" and in support of that claim Nizer quotes from comments by Malcolm Sharp, John Barkham, and Christopher Lehmann-Haupt. The Lehmann-Haupt quotation is a quote from the Nizer book as to Nizer's claim of the authenticity of THE IMPLOSION CONSPIRACY. Thus, Mr. Nizer is quoting himself. Mr. Barkham states that he could derive more information from THE IMPLOSION CONSPIRACY than he obtained from the newspapers at the time of the trial. Mr. Sharp notes that the book has,

as he politely puts it, "imaginative reconstruction."

16. I do not wish in this affidavit to put the array of reviewers who criticized the defendant's work as lacking in the very attributes of scholarship or historical merit. These are matters that should be determined by witnesses, experts, appearing on the witness stand in the course of a trial. I nevertheless would refer to The Sunday New York Times Review of THE IMPLOSION CONSPIRACY, as well as the law review by John Henry Faulk in 51 Texas Law Review, 1026. (Exhibit B attached hereto).

17. Reference is mage on page 9 of the Nizer reply affidavit that my estimate of the number of copies of the DEATH HOUSE LETTERS published in book, newspaper, or other form, both in the United States and throughout the world, disclaims any specific personal knowledge of the facts. I should like to bring to the attention of the Court that at this very moment I am in the process of seeking and beginning to receive documentary, and information in other forms with reference to the number of copies of the copyrighted letters published in one form or another under copyright in various countries throughout the world, including the United States. I believe I may obtain such documents in form which I will be able to introduce at the trial, as well as

obtain other data pursuant to stipulations or other discovery means. In any event, I have not been able to collect this information and state with specificity the number of copies of the letters published or sold to submit for this motion.

MARSHALL PERLIN

Sworn to before me this

21st day of May, 1975.

Notary Public

ISADORE NATHANSON
Notary Public, State of New York
No. 24-2851680
Qualified in Kings County
Commission Expires March 30, 1977

EXHIBIT A
(Attached to foregoing Surreply Affadavit of Marshall Perlin)

Letter Dated October 2, 1972
Dorothy McKittrick Harris to Permission Editor, Society of Authors

October 2,1972

Permissions Editor
Society of Authors
84 Drayton Gardens
London SW10 9SD

Dear Sir:

Enclosed are photostats of two pages of Louis Nizer's new book, THE IMPLOSION CONSPIRACY, which we are publishing on a crash schedule.

It is a non-fiction work, has been chosen (pre-publication) by three book clubs, and most likely will eventually become a reprint. In it, the author has included 111 words from Shaw's Saint Joan, which were quoted by Ethel Rosenberg (executed some years ago for espionage) in a letter she wrote to the judge in charge of the trial. In this confusion, I would guess I am asking tertiary permission, since I'm fairly sure Mrs. Rosenberg did not initially request permission.

From many years experience, I realize this is a muddy situation because of the value of the Shaw properties. However, under the circumstances, would it be possible for you to get word to me as quickly as possible because of our production schedule, plus the importance of Shaw to you and Nizer to us (and I'm in the middle). A collect cable and/or telephone call will be instantly acceptable, with the copyright notice to be used. Our galleys will be in October 13th and must be returned to the plant in a week.

I thank you for whatever help you can give, and look forward to hearing from you at the earliest (mail/phone/cable) possible moment.

Sincerely,

(Mrs.) Dorothy McKittrick Harris
Permissions Editor

'There is mercy which is weakness, and even treason against the common good.'"

Ethel felt his equal in a poetic contest. She wrote to Bloch:

"Enamored of quotations as the good judge seems, however, I would hazard the guess that a study of the following excerpts from Shaw's Saint Joan would not have inclined him to use them against the Rosenbergs! As you will recall, John de Stogumber, the English chaplain, who had been one of the most blood-thirsty advocates of Joan's proposed burning, comes rushing in from this spectacle, overcome with remorse and sobbing like one demented:

"'You don't know; you haven't seen; it is so easy to talk when you don't know. You madden yourself with words; you damn yourself because it feels grand to throw oil on the flaming hell of your own temper. But when it is brought home to you; when you see the

thing you have done; when it's blinding your eyes, stifling your nostrils, tearing your heart then - then, Oh, God, take away this sight from me! Oh, Christ! deliver me from this fire that is consuming me - She cried to Thee in the midst of it: Jesus! Jesus! Jesus! She is in Thy bosom and I am in hell for evermore!'

"And there shall you be, Judge Kaufman, for a crime 'worse than murder!'

Ethel"

The Rosenbergs' main thesis that they were the victims of a civil rights crisis in the nation was refuted by many liberals, including the American Civil Liberties Union. That organization, which had vigorously opposed the Smith Act aimed at Communists, nevertheless declared through its national board of directors that there was no civil liberties issue in the Rosenberg case. Further, that the death sentence was not so disproportionate to the severity of the crime to amount to a violation of due process. It found the death penalty was not motivated by political or religious considerations and that Judge Kaufman had the right to evaluate the effects of the crime on the international balance of power. The sentence under these

EXHIBIT B
(Attached to foregoing Surreply Affadavit of Marshall Perlin)

Law Review of John Henry Faulk
51 Texas Law Review, 1026, et seq.
and
The New York Times Book Review
by Robert Coover dated February 11, 1973

A law graduate properly prepared to identify and handle legal problems has knowledge of a wide range of subject matter. Property teachers using this book will have available more than enough material to meet their teaching preferences, no matter how eclectic. *Family Wealth Transactions* deserves a warm reception, and I hope that it gets one.

THE IMPLOSION CONSPIRACY. By Louis Nizer. New York: Doubleday & Company, 1973. Pp. 495. $10.00.

*Reviewed by John Henry Faulk**

Mr. Louis Nizer, a distinguished New York trial lawyer, has written a book about one of this century's most controversial trials—the 1951 Rosenberg-Sobell espionage trial. I am sorry he did. Because I like and respect Louis Nizer and because I was the grateful beneficiary of his legal skills several years ago, I regret that his book is so hopelessly flawed that it does a sad disservice to his talents as an attorney.

The Rosenberg-Sobell trial took place during that regrettable period in American history called the McCarthy Era. The quality of justice in that period of mass hysteria is comparable in Anglo-American jurisprudence only to the Popish Plot frenzy, which kept England in turmoil from 1678 to 1685, or to the Salem witchcraft trials of 1692. Justice was scarce in all three periods; only the severity of the punishment varied. Yet for the Rosenbergs even the punishment matched earlier ferocity.

As the cold war escalated in the late forties, anticommunism became our national religion. Not one Titus Oates, but a score of professional accusers elevated to the level of national heroes daily fanned the red scare frenzy. Eager congressional committees, enthusiastic prosecutors, and the national press aided their work. Government agencies and private groups compiled the names of American citizens suspected of subversive sympathies or associations in order to publicly brand the suspects and harry them from their jobs. State legisla-

* Mr. Faulk is the author of *Fear on Trial* (New York: Simon & Schuster, 1964); B.A. 1936, M.A. 1940, University of Texas.

tures and congressional committees hauled in citizens to question them about their political beliefs and demanded that they identify others with similar beliefs. Those who refused faced prison. Additionally, professional accusers told of red spy plots that flourished not merely in the highest circles of our Government but even in local PTA's. Any citizen who raised his voice against the excesses of the period they declared "soft on communism" and denounced as suspect.

On September 23, 1949, President Truman announced that Russia had exploded an atom bomb. Immediately many persons, including the well-known subversive hunter, Congressman Richard Nixon, charged that Truman's unwillingness to act against red spies in the United States had enabled an espionage ring to steal our atom secrets for Russia.[1] Others, including General Eisenhower and many scientists, received the news calmly. They pointed out that the United States had no monopoly on the scientific knowledge necessary for making atom bombs and that the real problem was the enormous industrial and financial outlay that their construction entailed.[2] But these statements did not deter those persons who thought that an atom spy ring operated somewhere in this country. Naturally, they believed the spies would be found in the ranks of communists and other subversives in America. And that is exactly where they were found.

Starting in May 1950, and continuing for the next six months, the Government made a series of nine arrests and publicized them as connected with Soviet atomic espionage. Despite the headlines, the Government did not charge three of those arrested with espionage but with other, unrelated crimes. Yet all but one had records of left-wing activities and communist sympathies, just the background many had predicted for the spies. In the summer of 1950 the Government arrested Julius and Ethel Rosenberg, two obscure natives of New York's lower East Side, and charged them with masterminding the atomic spy ring. Mrs. Rosenberg's brother, David Greenglass, had implicated them by telling investigators that the Rosenbergs induced him to become a communist and later suggested that he and his wife help steal atomic secrets for Russia. Greenglass had worked as a machinist at the Los Alamos Atomic Project in 1944-45. He claimed that he had mastered the intricacies of the atom bomb and its trigger,

1. N.Y. Journal-American, Sept. 24, 1949, at 1, col. 1.
2. N.Y. Times, Sept. 24, 1949, at 2, col. 2; *id.* at 12, col. 2 (editorial).

the implosive mold lens, by asking questions around the machine shop. According to his story, he then stored the information in his mind until he arrived in New York to deliver it to Julius Rosenberg for transmission to Russia. The public somehow did not find Greenglass' story absurd in the tense atmosphere of 1950.

FBI agents arrested Morton Sobell, a former college classmate of Rosenberg, a few days after the Rosenbergs. The Government charged Sobell with espionage, but not in connection with atomic secrets. A Justice Department press release accompanying each arrest stated the allegations against the defendants as unquestioned fact and quoted J. Edgar Hoover on the details of each defendant's role in the spy ring.[3] Since in those days most of the frightened public regarded J. Edgar Hoover's pronouncements on subversive activities as infallible, the Government clearly had presented its case in the press long before it reached a court. .

The Rosenbergs and Sobell went on trial in 1951 at the federal courthouse in Foley Square in New York City. Presiding Judge Irving Kaufman was outspoken in his loathing for communists and in his admiration for J. Edgar Hoover. Irving Saypol, who directed the prosecution, was at that time recognized as "the nation's number one legal hunter of top Communists" (p. 46). One of Saypol's assistants in the trial was Roy Cohn, who later earned notoriety as an eager assistant of Senator Joe McCarthy. The prosecution contended that the defendants committed the crime because of their communist beliefs. Consequently, Judge Kaufman admitted evidence of the defendants' political opinions, associations, and activities, always with a caution to the jury not to let the evidence influence their decision. Yet from the newspaper accounts of the trial it was difficult to tell whether the prosecution regarded the defendants' political beliefs or their alleged spy activities as the greater crime.

The three were found guilty. The court sentenced Sobell to thirty years in prison, and the Rosenbergs to death. Although the prosecution offered no evidence at trial that the Rosenbergs started the Korean war and caused 50,000 casualties, Judge Kaufman cited this reason, among others, for imposing the death penalty (pp. 355-57). He added that the love of communism "dominated their lives —it was even greater than their love for their children" (p. 357).

3. *Id.*, July 18, 1950, at 1, col. 2; *id.*, Aug. 12, 1950, at 1, col. 2; *id.*, Aug. 19, 1950, at 1, col. 1.

Yet the judge's sentence orphaned the Rosenbergs' two small sons. During a series of fruitless appeals the Government repeatedly offered to spare the Rosenbergs in return for full confessions. But they steadfastly asserted their innocence until their execution on June 19, 1953.

Approved by all but a small minority at home, the trial set off a storm of protest abroad. Since the execution numerous commentators have both lauded and attacked the verdict. Now Louis Nizer has written what his publisher advertises as the "final verdict" on the controversial trial. In his foreword Nizer asserts that he intended to write the definitive study of the trial. The reader will discover, however, that the author actually produced an uncritical apologia for the prosecution's case and the guilty verdict. This analysis might have been understandable twenty years ago during the McCarthy fever and before new evidence of the discrepancies in the prosecution's case came to light. But for an attorney of Mr. Nizer's ability to attempt a justification today completely baffles me. Although Mr. Nizer makes clear in his foreword that he intends to take the approach of the legal scholar, evaluating evidence and seeking new data, there is little indication that he did. The book has no index, no footnotes, and no real appendix, which makes hopeless the task of searching out the many factual errors, omissions, and contradictions. Some errors are so flagrant, however, that perhaps citation of a few will illustrate my point.

Mr. Nizer says that to assure absolute accuracy and fairness in writing about a trial, "There is no place for fiction or even imaginative reconstruction. That is the path to a counterfeit presentation. Authenticity is the key" (p. 3). Ignoring this injunction, he proceeds to fatten his work with fictional dialogues and reconstructions designed to support the prosecution's case (*e.g.*, pp. 76-78, 97-101). To make matters worse, he presents many of the fictional dialogues and reconstructions in a way calculated to lend the appearance of straight reporting to his imaginings. The author thus convicts himself of pursuing the "path to a counterfeit presentation."

The practice of fictionalizing leads Nizer into blunders so gross that his account of the events surrounding the case becomes partially, if not completely, misleading. Following a damaging but wholly fictionalized account of a conversation between David Greenglass and Julius Rosenberg (pp. 97-101), Nizer sets forth an account of Greenglass' arrest that bears little resemblance to the actual event. According to Nizer, FBI agents appeared at Greenglass' apartment at 2:00

p.m. on June 15, 1950, and announced that they had a search warrant and a warrant for his arrest. As Greenglass and his wife cowered in guilty terror, the FBI agents arrested him and carried him away. Two agents remained behind to search the apartment (p. 101). Yet according to the Justice Department's report of the arrest, the FBI came to the Greenglass' apartment on the morning of June 15, 1950, when Greenglass was there alone with his children. His wife had been hospitalized two days earlier. The FBI agents had neither a warrant for his arrest nor a search warrant, but searched the apartment with Greenglass' consent. He then voluntarily accompanied them to their headquarters where they questioned him for twelve hours without a lawyer. But they did not arrest him until late the next day, June 16, 1950.[4] Nizer leads the reader to believe that the FBI came to the apartment to arrest Greenglass as an atom spy. According to the Justice Department's official account, however, the FBI agents wanted to question Greenglass only about the theft of a little uranium from Los Alamos when he worked there in 1944 and 1945.[5]

Mr. Nizer trips himself up so often and so consistently that a reader wonders whether he read his finished account before it was published. He asserts that Harry Gold, one of the defendants, was arrested at a hospital in Philadelphia (p. 149); several pages later, the same arrest takes place—this time in Queens, New York (p. 161). Both accounts are wrong. The FBI arrested Harry Gold at a hotel in Philadelphia where they held him in "voluntary custody" for twenty-four hours.[6] Nizer adds to his account of Harry Gold's arrest at the offices of Brothman Associates in Queens, the statement that "Brothman was later convicted for espionage" (p. 161). But Brothman was convicted of "conspiracy to obstruct justice"—a far less serious crime.[7] Mr. Nizer is equally confused about Anatoli Yakovlev, the alleged Russian contact in the spy ring. Nizer said that Yakovlev worked at the United Nations and made a speedy exit from the United States in 1950, when the FBI cracked the spy ring (p. 150). Ten pages later he describes the same Yakovlev making the same desperate escape. But this time it occurred in 1946 because Harry Gold had blundered and jeopardized Yakovlev's cover (p.

4. *Id.*, June 17, 1950, at 1, col. 8.
5. Davidson, *The People Who Stole It From Us*, Look, Oct. 29, 1957, at 90.
6. N.Y. Times, May 24, 1950, at 1, col. 2.
7. *Id.*, July 30, 1950, at 1, col. 1.

161). Mr. Nizer might be surprised to learn that if Yakovlev was rushing to leave the United States, the prosecution's own Exhibit 26 does not indicate it. Exhibit 26, the records of the United [illegible] Lines, shows that in mid-October 1946, Yakovlev made reservations for a mid-November sailing from New York to Europe for himself and his wife and children. A pier strike delayed the departure until December 27, 1946. Even Nizer would agree that a spy who stretches out a panicky flight for two months is not earning his pay.

Another example of slipshod work is Nizer's explanation of how a particularly prejudicial piece of news, which the prosecution released to the papers during the trial, did not influence the jury. Mr. Nizer found no prejudice because the jurors were locked up each night and therefore could not read the newspapers (p. 222). The defendants had no grounds for complaint, he claims, since Rosenberg called the prejudicial news story to the court's attention in the jury's presence. Nizer then quotes a wit who remarked the irony: "[T]he jury is locked up and the defendant goes home" (p. 222). A cursory reading of the court record reveals, however, that the jury was not locked up during the Rosenberg-Sobell trial. The jurors went home each night. But the defendants were locked up, just as they had been since their arrests.

The reasons for Mr. Nizer's omission of much pertinent information are obscure. He did not include several prosecution exhibits, including Greenglass' sketches of the implosion lens and the atom bomb —the information that the Government believed to be necessary for the Russian bomb project. If the author had included them, the reader could readily understand why nuclear scientists have ridiculed the Greenglass sketches as "caricatures" and why today even a high school physics student would not suggest that the sketches would hasten development of an atomic bomb.

Author Nizer also omits any reference to serious, unanswered allegations that the prosecution both suppressed evidence and used forged evidence. He fails even to mention the testimony of Harry Gold and David Greenglass before the Senate Internal Security Committee in 1956—testimony that casts serious doubt on their credibility. Yet, if the two gave false testimony at the trial, the prosecution had no case, and Mr. Nizer knows it.

Nizer's appendix to the book will amuse legal scholars and confuse laymen. Its two pages consist entirely of a "numbers game" that Mr. Nizer uses to prove that the Rosenbergs received a fair trial. He

says that 112 judges reviewed the verdict without pointing out that 87 of the 112 are the same Supreme Court justices who never agreed to hear the case. Nizer simply multiplies the number of judges sitting on a court by the number of times that the court had the case before it; he counts the same judge separately for each time that he heard the case. The author mentions briefly but does not quote from, Justice Black's dissent to the Supreme Court's refusal of the Rosenbergs' final appeal (p. 470). In that dissent Justice Black observed, "[T]his Court has never reviewed this record and has never affirmed the fairness of the trial below. Without an affirmance of the fairness of the trial by the highest court of the land there may always be questions as to whether these executions were legally and rightfully carried out."[8]

In my opinion, Nizer's most grievous mistake in preparing this book was his failure to consider the most scholarly study ever done on the Rosenberg-Sobell trial. Unlike Nizer's book, *Invitation to an Inquest* by Walter and Miriam Schneir is thoroughly documented. The book exhaustively delves into the legal, social, and scientific aspects of the trial. Contrary to Mr. Nizer's conclusions, the Schneirs' study suggests that the Government executed the Rosenbergs for a crime that they did not commit and for a conspiracy that existed only in J. Edgar Hoover's press releases, in the prosecution's aspirations, and in the bizarre fantasies of Harry Gold.

Nizer does not explain why he failed to use the Schneir book,[9] or why he left out so much of the evidence favorable to the Rosenbergs. But the explanation may lie in an anecdote Nizer relates about a judge who became famous for rendering a record number of decisions in one year. The judge explained this achievement by declaring that he listened to the plaintiff's evidence and decided the case immediately. "Don't you listen to the defendant too?" someone asked. "I used to," the judge replied, "but I found it confused me" (p. 5).

8. Rosenberg v. United States, 346 U.S. 273, 301 (1953) (Black, J., dissenting).

9. A letter in the *New York Times* charges that Mr. Nizer has declined an invitation to publicly discuss the Rosenberg case with the Schneirs. N.Y. Times, April 22, 1973, § 7 (Book Review), at 32.

The Implosion Conspiracy

By Louis Nizer.
Illustrated. 495 pp. New York:
Doubleday & Co. $10.

A-578

By ROBERT COOVER

Among the holy days to be celebrated by Communists, Fascists and Americanists in 1973 are the Bicentennial of the Boston Tea Party, the Sesquicentennial of the Monroe Doctrine, the Diamond Jubilee of the Spanish-American W[illegible] and the Founding of the Social Democratic Parties of the World, the Golden Jubilee of Hitler's Beer-Hall Putsch and the Silver Jubilee of the Founding of the Republics of North and South Korea, the Berlin Airlift and the Hanging of the Japanese Warlords. It is also the 40th Anniversary of United States Recognition of the Soviet Regime in Russia and the Founding of the Third Reich, the 30th of the Battle of Stalingrad and the Fall of Mussolini, and the 20th of the Death of Stalin, the Korean Armistice and the Electrocution of Julius and Ethel Rosenberg by the United States of America.

The Rosenbergs, born during World War I on New York's Lower East Side, were accused of masterminding a spy ring that stole the secret of the atom bomb for the Russians toward the end of World War II. At their trial in 1951, pleading innocence, they were found guilty—officially—of "conspiracy to commit espionage," but in fact they were held responsible, in the words of the sentencing judge (later echoed by the President of the United States), for having "caused . . . the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason." The principal evidence against them was the testimony of Ethel's kid brother, David Greenglass, and his wife, Ruth. (They pleaded guilty to the same charges; David received a 15-year sentence and was paroled after seven, while Ruth was never even brought to trial.) After a series of unsuccessful appeals, the Rosenbergs were finally condemned to die on their 14th wedding anniversary, June 18, 1953, but a last-minute Supreme Court intervention delayed their execution by one day.

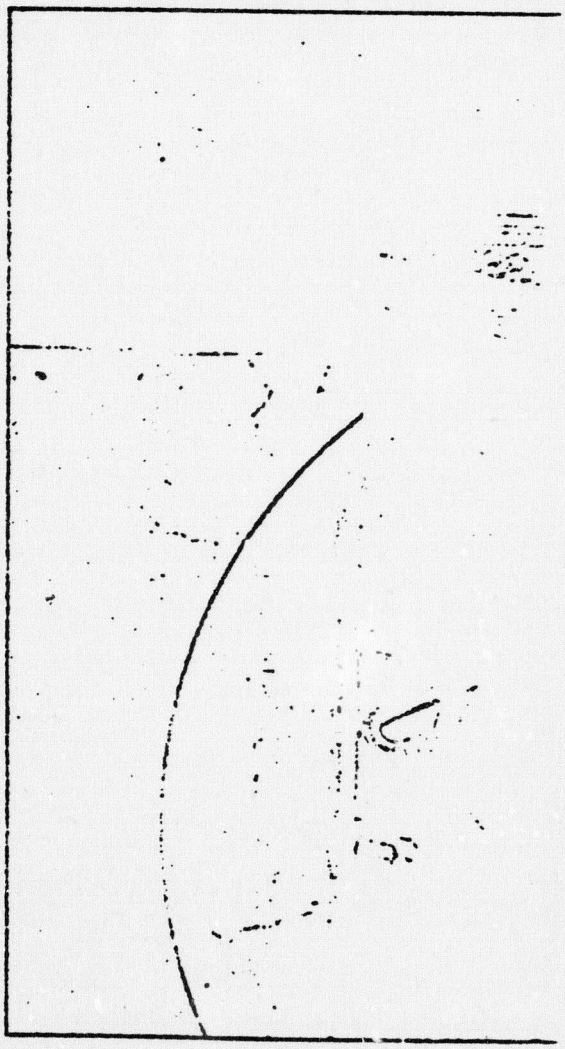
Fascists and Communists responded more or less predictably, though many foreign Fascists doubted the wisdom of providing martyrs for the Communists, and the Communists seemed very slow to accept the Rosenbergs as two of their own. Eventually they did so, and for a short time the day of their executions was actually one of five Commemorative Days on the East German calendar, along with Stalin's Birthday, the Allied Bombing of Dresden, Red Army Day and World Peace Day. The Rosenbergs themselves, who had once been Communists and perhaps still were, insisted they were simply decent loyal middle-class American parents and went to their deaths believing they were "the first victims of American Fascism."

Americanists, generally disdainful of the "simplicities" of both Fascism and Communism (both are in some rough way the "enemy"), prefer to celebrate the case as one more episode in the legendary watchdog exploits of the F.B.I., a triumph of Anglo-Saxon jurisprudence, a moral lesson on the virtues of the "middle way" and the malignancy of foreign ideologies, and a touching love story. As for the electrocutions, they tend to distress and titillate Americanists at the same time.

Such, predictably then, is the response of Americanist Louis Nizer in this long-winded superficial review of the trial. In spite of all his breast-beating about "neutrality" ("I had no difficulty being objective. I had nothing to overcome. I started with a clean slate; no prior convictions, no desire to demonstrate guilt or innocence. I let my thorough research carry me where it would . . ."), his clear intention from the outset is to extol American justice and fair play, destroy lingering doubts about the trial, mock the competing faiths ("First, is the phenomenon of interchangeable roles between Fascists and Communists... Their parallelism in authoritarian control and the denial of any consent of those ruled makes all differences in 'principle' sheer sophistry . . .") and indulge himself in a fantasized melodramatic account of the personal tragedy of Julius and Ethel Rosenberg. It is the old American error: assuming that a third position is a neutral one.

The author of this book—and an accompanying screenplay, written for Otto Preminger—is, after all, still the Louis Nizer who was vigorously propagandizing in 1946 on behalf of an armed America, keeping the atomic bomb a United States military secret, providing support for "democratic groups" in Eastern Europe, [illegible] sion of the U.S.S.R., and abolishing the Communist party in the United States or requiring its members to register as foreign agents. This is the man who, about the time the Rosenbergs were being apprehended, was urging in this newspaper a "drastic revision" of the American judicial procedure to insure that "Communists who come into court and defy the judicial system can be firmly dealt with." And this is also the wealthy New York City trial lawyer who counts among his oldest professional colleagues Federal Judge Irving Kaufman, the judge in the Rosenberg trial, and New York Supreme Court Justice Irving Saypol, who was the prosecuting attorney at the time. (They all tend to turn up at the same banquets together.)

Still, if Nizer were an honest writer, he might have provided us, given his special knowledge and even admitting his biases, with new insights into the Rosenberg case. This is a curious case in which clearly the most damaging "testimony" against the accused was the implication that the F.B.I. had a drawer full of evidence too "secret" to be presented in court—and evidently still too secret today, 22 years later . . . if, in fact, this evidence ever existed. In an interview a couple of years ago,



Robert Coover is author of "The Origin of the Brunists," "The Universal Baseball Association," "Pricksongs and Descants" and, most recently, "A Theological Position."

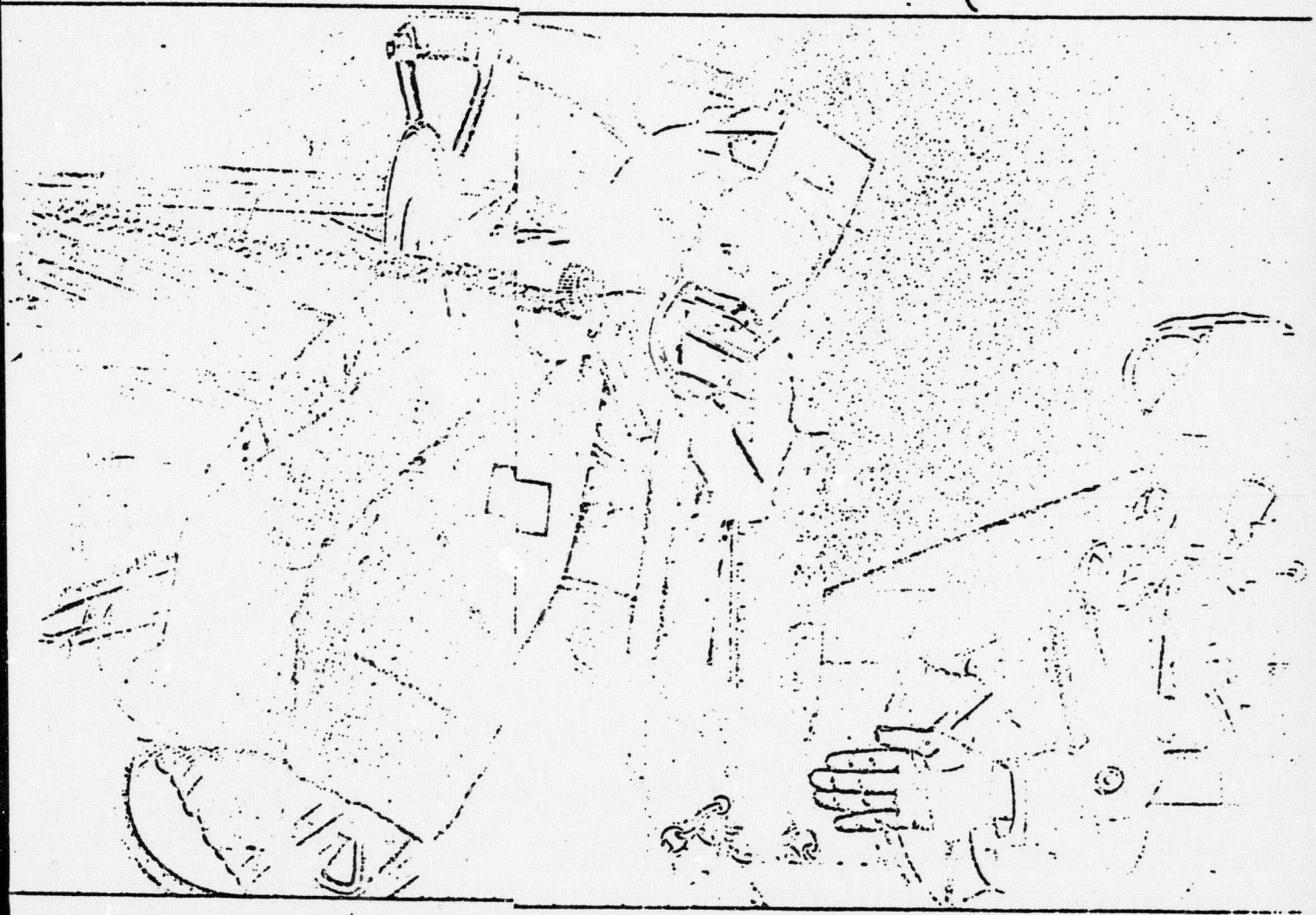
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ecution testimony of Greenglass and Gold was rigged during their six months together in the Tombs before the trial, and perhaps analyzed in general the "investigative" techniques of the assistant prosecutor, Roy Cohn, later famous as special assistant to Senator Joseph McCarthy. But instead he merely ridicules

Kaufman, Prosecutor Saypol, Attorney General Herbert Brownell, the Supreme Court Justices, F.B.I. agents, Greenglass defense lawyers and prosecution assistants. He might have discussed the consequences of a jury made up mostly of auditors, examined the conspiracy law that has been troubling Americans all century, and inquired in particular into

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what he calls the "analytical syndrome."

As a man excited by the dramaturgy of the courtroom and who believes that right judgments flow, not from the testimony so much, but from the styles of the players, he might at least have asked how fair play is possible when the prosecution has so much more rehearsal time and knows what the script is

the legal appropriateness of linking the Rosenbergs with Morton Sobell as co-conspirators.

Instead, Nizer asks a very small question (and consequently, for all its thickness, this is a very small book): "Do you think there was sufficient evidence for a jury which heard and saw the witnesses, and not merely the printed testimony, to find them guilty?" His answer:

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and consult books by John Wexl
Jonathan Root and Bob Consid
souping them up in accordance w
his appetite for ("Never before
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going to be, while the defense has to play it as improvisation theater, not even sure what props are going to be used or where they are coming from. In fact, even the judge, along with the entire prosecution team, had a run-through during the less important but similarly structured Brothman trial shortly before—was it proper, therefore, to try this case with the same cast of characters?

Nizer might have taken us behind the scenes to discover for us something about the motivations of Judge Kaufman, Prosecutor Saypol, Attorney General Herbert Brownell, the Supreme Court Justices, F.B.I. agents, Greenglass defense lawyers and prosecution assistants. He might have discussed the consequences of a jury made up mostly of auditors, examined the conspiracy law that has been troubling Americans all century, and inquired in particular into

"Yes." The same question, affirmatively answered, might be asked, of course, of any Mississippi race-rape trial. Nizer quotes voluminously from the trial transcript (rearranging the materials for the sake of argument and drama, working toward his screenplay for Preminger) and then argues that if the testimony is not convincing, this is because you were not there and could not see the witnesses "scissor their legs" or "pass their hands over their mouths before answering" or "reveal a crude streak of language or attitude," etc. Above all, he wishes to convince us that everyone concerned was a fair and reasonable man and that the verdict was the best possible under the circumstances, even if the punishment was a little cruel.

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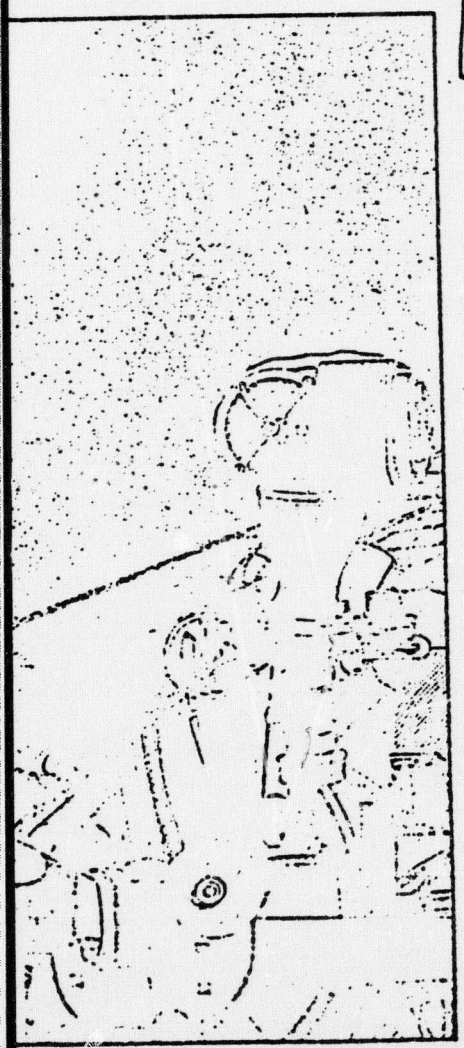
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transcript, looking for good dialogue, and consult books by John Wexley,

zy (for example, dissatisfied with only the one pro-Rosenberg rally at Union Square, Nizer describes New York as "seething" and invents other meetings "taking place throughout the city"), and Considine's report on the Sing Sing executions becomes an elaborate barbecue, in which Nizer manages to insert the news that when Julius died his body "collapsed like a puppet," and that while Ethel's body "smashed convulsively against the straps," the electricity made "weird, rhythmic dissonances, as if witches were howling in the wind."

Throughout the book, Nizer stretches and contracts time according to dramatic whim, invents whole scenes and fictionalizes freely (especially when those involved are conveniently dead), avoids all controversy and sensationalizes wherever possible, even on occasion melodramatizing errors. Thus, borrowing a note from Jonathan Root, who mentions in "The Betrayers" that London during the June 19 demonstration against the executions was "festively decorated for Queen Elizabeth's Coronation," Nizer elaborates: "In England at that time the joyous preoccupation was preparation for Queen Elizabeth's coronation. Buildings were being clothed with decorations . . . Britain's coronation preparation had been turned into 'Save the Rosenbergs Week.'" Of course, the Queen had been crowned over two weeks before, on June 2.

Basically, Nizer follows the conservative line on the case (they were guilty, our institutions are honest and reliable), but leans on the Rosenberg advocates for the love story (the romantic, bourgeois but ill-fated lovers), accepting the Rosenbergs' courtroom role-playing at face value and lamenting their "blind" search for "wild" and "illusory" solutions "for a better world." Just as he does not allow 20 years of inquiry into this case (see, for example, "Invitation to an Inquest" by Walter and Miriam Schneir, out this month in paperback from Penguin Books, $2.95) to cloud his benign judgments on the trial, so does he avoid any information that might make the Rosenbergs recognizable human beings.

One of the facts of this case that most inflamed Prosecutor Saypol, for example, leaving him convinced 17 years later that they deserved to die, was the alleged F.B.I. discovery in the Rosenberg flat of "a collection of pornographic records, and records that were sacrilegious in nature ridiculing religious ceremonies such as the Kol Nidre chant." Did not have room in his spy drama and love story for these questions.

One is inclined to wonder, in fact, if this pornography is not the whole of the long-withheld "damaging" F.B.I. testimony. Certainly, this remains the most important unanswered question of the Rosenberg case: Where is all the information the F.B.I. claimed to have in its possession? At the time of the trial, Saypol implied that this information was being withheld so as not to disclose too much about the operations of the F.B.I., who were that moment closing in on other members of this spy ring. These further arrests have never been made. Emmet John Hughes, in "The Ordeal of Power," reports that on the very morning of the executions, President Eisenhower was wavering on the question of clemency, and was convinced finally by the assurances of Attorney General Brownell: "I've always wanted you to look at evidence that wasn't usable in court showing the Rosenbergs were the head and center of an espionage ring here in *direct* contact with the Russians—the *prime* espionage ring in the country." Ike, who did not like to read, replied: "My only concern is in the area of statecraft—the *effect* of the action," and somehow, with that, the uncertainties faded away and clemency was routinely denied.

And if this "evidence" were just a fabrication, wishful thinking on the part of worried F.B.I. agents, if the government lied when it claimed its files were full of damning information, then were the Rosenbergs right in protesting that they were innocent people being blackmailed by the F.B.I. to concoct a spy ring? Judge Kaufman has often remarked that the Rosenbergs could have saved their own lives if they had only followed the example of Gold and Greenglass—did he know before the trial began that he must threaten them with death if they were found guilty? Or was he, too, duped by the F.B.I. claims?

Why did he feel obliged to blame the Rosenbergs for the Korean War in order to justify the death penalty? Eisenhower also made this charge when denying clemency, but one would expect such distorted reasoning from him. But there is nothing in Kaufman's career or character to suggest such simplicity. Without the famous missing evidence, one can only guess that the F.B.I. was fumbling in the dark, had a hunch they were right or nearly right, and took a chance that by putting maximum pressure on the Rosenbergs they

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transcript, looking for good dialogue, and consult books by John Wexley, Jonathan Root and Bob Considine, souping them up in accordance with his appetite for ("Never before in history . . .!") melodrama. Thus, Wexley's romantic descriptions of the young Rosenbergs become maudlin and moralistic, Root's chapter on the demonstrations against the executions becomes a mad worldwide fren-

Throughout the book, Nizer stretches and contracts time according to dramatic whim, invents whole scenes and fictionalizes freely (especially when those involved are conveniently dead), avoids all controversy and sensationalizes wherever possible, even on occasion melodramatizing errors. Thus, borrowing a note from Jonathan Root, who mentions in "The Betrayers" that London during the June 19 demonstration against the executions was "festively decorated for Queen Elizabeth's Coronation," Nizer elaborates: "In England at that time the joyous preoccupation was preparation for Queen Elizabeth's coronation. Buildings were being clothed with decorations . . . Britain's coronation preparation had been turned into 'Save the Rosenbergs Week.'" Of course, the Queen had been crowned over two weeks before, on June 2.

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closing in on other members of this spy ring. These further arrests have never been made. Emmet John Hughes, in "The Ordeal of Power," reports that on the very morning of the executions, President Eisenhower was wavering on the question of clemency, and was convinced finally by the assurances of Attorney General Brownell: "I've always wanted you to look at evidence that wasn't usable in court showing the Rosenbergs were the head and center of an espionage ring here in *direct* contact with the Russians—the *prime* espionage ring in the country." Ike, who did not like to read, replied: "My only concern is in the area of statecraft—the *effect* of the action," and somehow, with that, the uncertainties faded away and clemency was routinely denied.

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STATEMENT PURSUANT TO GENERAL RULE 9(g) DATED APRIL 25, 1975

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

- x

MICHAEL MEEROPOl and ROBERT MEEROPOL,

Plaintiffs

- against -

LOUIS NIZER, DOUBLEDAY & COMPANY, INC.
and FAWCETT PUBLICATIONS, INC.

Defendants.

- x

73 Civ. 2720
(MP)

STATEMENT PURSUANT TO
GENERAL RULE 9(g)

Plaintiffs submit the following statement pursuant to General Rule 9(g) of this Court in opposition to the motion for summary judgment dismissing counts I and III of the complaint and the supplemental complaint and state that the following material facts are those wherein their exist genuine issues which are required to be tried:

1. DEATH HOUSE LETTERS OF ETHEL AND JULIUS ROSENBERG was published in June, 1953 and duly filed with the Register of Copyrights who issued a certificate of registration dated June 24, 1953.

2. The aforesaid book was published in the United States and England in English, and in other

countries in the Americas, Europe and Asia in other languages with due and proper copyright notices and in compliance with the applicable copyright laws.

3. DEATH HOUSE LETTERS were published in more than one edition in the United States under that title and also under the title THE TESTAMENT OF ETHEL AND JULIUS ROSENBERG with due notice and maintaining the copyrights pertaining thereto.

4. DEATH HOUSE LETTERS contains letters written by Julius Rosenberg and Ethel Rosenberg while they were in cusody from the period August, 1950 through March 19, 1953, including letters dated June 16, 1953 from the Rosenbergs to President Eisenhower and June 19, 1953 from the Rosenbergs to Emanuel H. Bloch, and the plaintiffs herein.

5. Plaintiffs are the owners of the copyrights to said books and the contents thereof, said copyright remaining in full force and effect and renewable for an additional twenty-eight years from 1981.

6. During the period 1953 through 1956 approximately 350,000 to 500,000 copies of the DEATH HOUSE LETTERS under that title and others and in various languages were published, sold, and distributed, all with due and proper

copyright notice, said publications outside the United States being pursuant to licensing agreements with copyright owners retaining all their copyright interests and ownership therein.

7. Monies were received from the publishing, sale, and distribution of the aforesaid copyright works inter alia by Jero Publishing Company, Inc. and by the Rosenberg Childrens Trust Fund, Inc., the guardians of the plaintiffs herein and by their guardians in their behalf. The plaintiffs do not have present knowledge of the amounts and their distribution.

8. The contents of the DEATH HOUSE LETTERS are the writings of the Rosenbergs which are their unique personal expressions, as well as their feelings and opinions of the world about them and the events relating to their arrest, prosecution, and conviction, said writings being literary expressions of high literary quality and value articulated with intelligence and feeling.

9. The defendants took, used, printed, and published in the IMPLOSION CONSPIRACY without the consent of the copyright owners portions of the aforesaid copyrighted property.

10. THE IMPLOSION CONSPIRACY written by defendant

Nizer and published by defendants Doubleday & Company, Inc. and Fawcett Publications, Inc. is an inaccurate, non scholarly, fictitious writing, falsely held out to be true and accurate

11. THE IMPLOSION CONSPIRACY is not a scholarly work and is not based on any meaningful research or a product of any care. The infringing work, other than the plaintiffs' copyrighted property, is composed of inaccurate and distorted excerpts of the trial record; of the false and fictitious dialogue held out to be portions of an official record,with the remainder being extracted from secondary and tertiary sources, some of which are highly inaccurate, without any effort to verify the sources; using said sources in an inaccurate and deceptive manner.

12. THE IMPLOSION CONSPIRACY does not contribute or add any knowledge to its subject matter and has no value whatsoever as a source of materials to any scholar, biographer, historian, or social scientist, or reading public, and by reason of false representations in said book, deceives the reader.

13. The defendants hold out the infringing work as a complete study of the Rosenberg - Sobell case while, in fact, the defendant author and his publishers knew that they were excluding relevant portions thereof which

had direct bearing upon the portions covered by said infringing work, thus giving the reader a false account of the case.

14. The defendants used and misappropriated substantial portions of the plaintiffs' copyrighted property in order to falsely cloak the book with an appearance of authenticity and reality and to promote the sale of the book for the benefit of the defendants.

15. The defendants copied verbatim approximately 2,000 words by extracting substantial portions of letters from the DEATH HOUSE LETTERS and an additional approximately 1,058 words from other letters of the Rosenbergs contained in THE TESTAMENT OF ETHEL AND JULIUS ROSENBERG, and extracted and placed in the text of said work other portions of the plaintiffs' copyrighted property.

16. The copying verbatim and use of the copyrighted property by the defendants in THE IMPLOSION CONSPIRACY was substantial both in quality and quantity and was an important part of the contents of the infringing work.

17. The defendants could have, without verbatim copying or paraphrasing, derived information from the copyrighted works and written about them.

18. The defendants so used the copyrighted

property in THE IMPLOSION CONSPIRACY distorted and derogated the same, and damaged said property in the eyes of the public and diminished their economic value and salability now and in the future, and wrongfully sought to affect the future sale of said property.

19. The defendants falsely imputed that the writings of the authors, both the published and unpublished letters, were contrived, artificial, and did not reflect the true feelings and beliefs of the authors, all to the damage of said property.

In response to defendants' statement pursuant to General Rule 9(g), plaintiffs state as to paragraphs:

1. Denies that no portion of DEATH HOUSE LETTERS is being published.

3. Plaintiffs are without sufficient knowledge to either affirm or deny.

4. Plaintiffs are without sufficient knowledge as to whether Dennis Dobson, Ltd. ever applied or filed for ad interim protection.

6. Acknowledges Exhibits 1 through 4 are true copies of financial statements prepared by an accountant for Jero Publishing Company, Inc. and the Rosenberg Children's Trust Fund.

7. Denied.

9. Denied except that there are exhibits from 28 letters contained in the DEATH HOUSE LETTERS. and said 28 letters are identified in paragraph 1 of the Answers to Interrogatories.

10. Denied. Except that the pages as set forth therein do contain verbatim copying of the plaintirfs' copyrighted property.

12. Denied.

14. Admit. Except that the book will contain some but not all of the unpublished writings which are the subject of count III and will also contain portions of the writings which are a subject of count I and that the publication of said book is scheduled for May, 1975.

The said statement is submitted pursuant to General Rule 9(g) and the affidavits in opposition to the motion for summary judgment have been submitted prior to completion of discovery. The defendants have failed and refused to permit discovery as to the counts at issue in the present motion by refusing to answer certain questions or produce documents, to appear at depositions or to permit inquiry into areas which are the subject matter of the present motion. Written interrogatories addressed to the defendants regarding the contents of THE IMPLOSION CONSPIRACY, its accuracy

and the sources and basis of the writings and the defendants' knowledge with respect thereto will be submitted to them but plaintiffs verily believe that such discovery must include oral depositions. Defendants have not permitted discovery with respect to damages in this action. The completion of all of the above discovery would be essential for plaintiffs to file a full and complete response to defendants' motion.

Dated: New York, New York
April 25, 1975

MARSHALL PERLIN
Attorney for Plaintiffs Michael and Robert Meeropol

TO:

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON, ESQS.
Attorneys for Defendant Louis Nizer
40 West 57 Street
New York New York 10019

SATTERLEE & STEPHENS, ESQS.
Attorneys for Defendants Doubleday & Company, Inc. and Fawcett Publications Inc.
277 Park Avenue
New York, New York 10017

SUPPLEMENTARY AFFIDAVIT OF MARSHALL PERLIN IN RESPONSE TO THE COURTS REQUEST SWORN TO MARCH 31, 1976

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

- x

MICHAEL MEEROPOL and ROBERT MEEROPOL, 73 Civ. 2720 (LPG)

Plaintiffs

- against -

LOUIS NIZER, DOUBLEDAY & COMPANY, INC. and FAWCETT PUBLICATIONS, INC.

Defendants.

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARSHALL PERLIN, being duly sworn, deposes and says:

1. I submit this affidavit in response to the Court's request at the hearing of March 23, 1976 that plaintiffs set forth the nature of the evidence which they would present in response to the defendants' tendered defense of fair use.

2. This affidavit is premised that plaintiffs are the copyright owners, the copyright is a valid copyright in full force and effect, and that the defendants copied and used verbatim, without permission or consent of the plaintiffs, the copyrighted material.

3. Since, on the premises set forth above, the plaintiffs have established their prima facie case, it then

becomes the burden of the defendants to claim, and factually prove, fair use. Since the burden at this stage of the proceedings would be upon the defendants to establish those facts and defense and the plaintiffs to rebut, rather than disprove prior to defendants' case, to a substantial extent, this affidavit is premised in part upon the speculation as to what the defendants might tender as proof. The only indication of the nature of the defendants' proof is that set forth in their affidavits in support of their motion for summary judgment which, in turn, is based upon "an expanded record" since the Court's denial of defendants' motion to dismiss in the opinion of Judge Tyler of July 19, 1973.

4. The sole expanded record in the present motion for summary judgment consists of:

(a) Excerpts from Judge Tyler's opinion of July 19, 1973;

(b) Portions of the financial records of Jero Publishing Company and the Rosenberg Children's Trust Fund; and

(c) The contention that letters are "historical facts", thereby dehuding the copyrighted material of copyright protection and making them vulnerable to "fair use infringement" even though there is verbatim copying.

5. The opinion of Judge Tyler was premised upon an ultimate trial of the multiple issues of fact underlying a defense of fair use and he touched upon some of them in the course of his opinion, saying that the defendants "are likely to prove that their book is a serious full and readable account of what was a trial of great historical interest" and that the defense of fair use is premised upon the belief that "the book almost certainly will provide reasonably valuable serious material for future historians, biographers and social scientists." In denying defendants' motion to dismiss, Judge Tyler once again, referring to the underlying factual issues in applying the doctrine of fair use, stated: "But fair use would seem to be a function of all the circumstances, and the plaintiffs should have an opportunity to rebut the presumption that arises from the nature of the materials and the circumstances described herein."

6. Thus, in responding to this Court's request as to the nature of the factual evidence to be presented by the plaintiffs in rebutting fair use, we do so absent all the "circumstances" that might possibly be tendered by the defendants.

7. Since the evaluation of the application of the fair use doctrine depends upon the weighing of a complex

of factual elements which are interrelated factors, they must be considered not only individually but in their totality in light of all of the "circumstances." These elements which would embrace the facts tendered with respect thereto are as follows: (a) the nature of the copyrighted material infringed upon; (b) the nature of the infringing work and the character, use, and value of the copyrighted work in relation thereto; (c) the quantity, quality, and value of the copyrighted work; and (d) the effect of the infringement upon the copyrighted property. As will be set forth below, the nature of the evidence that would be adduced in this case as to those issues demonstrate the overlapping, as well as the interrelationship of each, which must be considered in light of all of the other factual circumstances.

8. Using the above general categories relating to the issues underlying fair use, I set forth below the nature of the evidence that will be tendered by the plaintiffs herein recognizing that the scope and particularity would be affected by the nature of the evidence tendered by the defendants in seeking to establish their claim of fair use. While much of the evidence would be related to both the copyrighted work (THE ROSENBERG LETTERS) and the infringing work (THE IMPLOSION CONSPIRACY) much of the evidence adduced

would be extrinsic and de hors the four corners of the copyrighted material and infringing work.

9. The Nature of the Copyrighted Material Infringed Upon

(a) The letters of the Rosenbergs are eloquent expressions and moving narrations and constitute writings of high literary quality and are unique.

(b) Letters are accepted and valid literary forms, and the ROSENBERG LETTERS are of unique character, dramatic force and impact, having a particularly lyrical and eloquent character and their form of writing and expression constitute part of our current literary heritage.

(c) The letters have been widely sold and read in copyrighted material throughout the world and their literary quality and significance have been almost universally accepted.

(d) The letters at issue have been accepted as letters written by the authors while they were in isolation under attack while their lives were held in the balance and truthfully and authentically express the sincere feelings and attitudes of the authors about each other, their immediate family, and the circumstances they were confronted with.

10. The Nature of the Infringing Work and the Character, Use, and Value of the Copyrighted Work in Relation Thereto

(a) The defendants held out and represented the book THE IMPLOSION CONSPIRACY to be an accurate and complete legal and historical study of the Rosenberg case based upon exhaustive research and objective facts only, and without any fictionalization, distortion, or "imaginative reconstruction" and that authenticity was the crucial aspect of the book, both as to the legal proceedings, the parties involved and portrayed, meeting the requirements of methodology and authenticity of a law review article and a Pulitzer Prize journalist narration of historical fact. Said claims and representations set forth in the book itself were false, as the defendant author and defendant publishers then knew.

(b) The book, in fact, is based upon a fictionalized, inaccurate movie script which, in turn, was derived from John Wexley's book THE JUDGMENT OF JULIUS AND ETHEL ROSENBERG and a book based upon the Wexley book, THE BETRAYERS by Jonathan Root and from other secondary tertiary and fictional sources, including the BOOK OF DANIEL by E. L. Doctorow. Portions of THE IMPLOSION CONSPIRACY were derived from the trial transcript in altered and distorted form.

(c) Defendants in purporting to quote the trial transcript did so in grossly erroneous, misstated, and distorted form. Imagined fictionalized dialogue was set forth in the book and held out as portions of the trial transcript and portions of the trial transcript were, in turn, converted into fictitionalized dalogue.

(d) Fictionalized conversations were created and injected into the book, and held out as true, allegedly between the Rosenbergs, their attorneys and others, including the plaintiffs herein.

(e) The defendants abjured any investigative work or research and failed and refused to obtain actual facts, as well as verification of facts from persons having knowledge of the same and available to the defendants.

(f) Substantial portions of the book were plagiarized from the Wexley book and paraphrased in a manner to distort the truth and meaning thereof with fictitious additions held out as fact.

(g) Even where facts were available to the defendants, they chose to reject the same and set forth fictionalized events, conversations and events in the court room which the defendants knew to be inaccurate, untrue, and misleading.

(h) THE IMPLOSION CONSPIRACY is not a serious, full, or accurate account of a trial of historical interest, but, rather, one that confuses, obscures, and co-mixes fact with fiction and falsely holds out the composite as truth and fact.

(i) A co-worker of defendant Nizer, who participated in the creation and content of the movie script and the book THE IMPLOSION CONSPIRACY acknowledged that portions of both works were fictional and solely the fictitious result of the author's imagination and retroactive reconstruction for dramatic purposes.

(j) The book THE IMPLOSION CONSPIRACY is not a serious, full, or readable account of the legal proceeding or the facts surrounding the Rosenberg case; it provides no material of value for future historians, biographers or social scientists.

(k) The book does not further "the public interest in the development of art, science, and industry" and its distribution would not "serve the public interest." Rather, the infringing work misleads, confuses, and deceives any reader of the same and hence constitutes a work which is the very opposite of a "serious, full and readable account of what was a trial of great historical interest."

(l) THE IMPLOSION CONSPIRACY purports to be a full, complete, and accurate account of the Rosenberg

case, yet the author knowingly suppressed or ignored relevant historical facts, including legal proceedings which are reflected in the files and records of that case.

(m) The defendants knowingly misappropriated and used substantial portions of the plaintiffs' copyrighted property in order to exploit the literary quality of the plaintiffs' property and to falsely cloak the book with an appearance and impression of authenticity and reality and to mislead the reader of the book into believing that the book was a true and accurate and exhaustive study of the Rosenberr trial from the legal and historical aspects, as well as a true portrait of the persons involved.

(n) Plaintiffs' copyrighted material was placed in the last third portion of the book which purported to give an accurate and historical description of what occurred after the completion of the trial in April of 1951 to the time of the execution on June 19, 1953. This is the portion of the book containing an almost entirely fictionalized and imagined version of events, derived primarily from other secondary and tertiary sources, non-documentary and fictional, including Root and Doctorow.

(o) The defendants in promoting the sale of the book and their claims of accuracy, completeness and

to enhance the emotional impact relied heavily upon the plaintiffs' copyrighted material, the letters of Ethel and Julius Rosenberg. The defendants exploited and misused these letters to falsely sentimentalize their book and to obscure the incomplete and non-scholarly and inaccurate portions of the book where defendants held out fiction as historical fact.

(p) In promoting the sale of the book, the defendants imported to the readers and hearers of their promotional material that the defendants owned, had possession and control of the Rosenberg letters and had access to information heretofore not disclosed.

(q) The defendants intentionally in appropriating the copyrighted property used and chronologically misplaced excerpts out of context so as to alter the meaning of the letters. The defendants, while attributing high literary quality to the copyrighted work, by their distorted use of the excerpts, then falsely attributed an intention by the authors to disemble, mislead and contrive by means of the letters and that the contents thereof were directed by persons other than the authors.

11. The Quantity, Quality and Value of the Copyrighted Work

(a) The defendants quoted verbatim

approximately 2,000 words of the copyrighted letters from THE DEATH HOUSE LETTERS and used in conjunction therewith approximately 1,058 words from other letters of the Rosenbergs contained in THE TESTAMENT OF ETHEL AND JULIUS ROSENBERG, all in the last third of the book THE IMPLOSION CONSPIRACY. The manner in which the defendants used and misappropriated the copyrighted work in THE IMPLOSION CONSPIRACY constituted a substantial appropriation in both quality and quantity and that portion of the book was of great value to the defendants in promoting the sale of the book and seeking to authenticate the contents thereof. See paragraph 10 supra.

(b) The defendants chose to appropriate the copyrighted work by verbatim copying rather than extracting and setting forth the information contained in the Rosenberg letters because of defendants' heavy reliance and upon an exploitation of the copyrighted material in promoting and selling THE IMPLOSION CONSPIRACY.

(c) It is a standard rule of the trade in the publishing industry in the United States that fair use of a copyrighted work may never exceed 300 words in totality in the appropriating book or publication, and that the limit is even less where the extract of the copyrighted materisl is an entire par-

agraph or portion of the copyrighted work. In computing the outside limit of 300 words, one includes the totality of words in the infringing work, rather than the number of words of a particular extract in any portion of the infringing work. In an anthology of works or a collection of works, as the DEATH HOUSE LETTERS, permission must be obtained for every selection, no matter how short the selection is individually or in totality in the infringing work.

(d) The effect of defendants' infringement upon the copyrighted property, the infringing work and defendants' statements with reference thereto falsely import that the defendants are the owners, possessors and controlling parties of plaintiffs' copyrighted property and that defendants have received the right to control, possess, use, and distribute all of the same.

(e) The defendants by wrongfully exploiting and using the copyrighted property in THE IMPLOSION CONSPIRACY have damaged and adversely affected the value and public esteem and comprehension of the copyrighted property.

(f) The defendants by their use and excerpting substantial portions of the copyrighted property, along with false, fictitious and distorted statements contained in the book THE IMPLOSION CONSPIRACY and related to those letters, altered the meanings and

import of the copyrighted material, misplacing the copyrighted material chronologically and otherwise so as to derogate said material.

(g) By reason of the above and by obviously attributing the evil, deceptive motive to the authors of the copyrighted material, defendants imported that the authors were not expressing their true feelings and further imported that said writings were contrived and composed at the initiative and at the behest of other persons, thereby causing doubt about the credibility and meaning of the copyrighted letters.

(h) The effect of the defendants' wrongful acts in appropriating and misusing the copyrighted work and casting doubt upon the credibility of the copyrighted works, impaired and damaged all of the letters contained in THE DEATH HOUSE LETTERS, of which the plaintiffs are the copyright owners, as well as damaged the Rosenberg letters not yet published or disseminated, and thus damaged and impaired the value and future exploitation of the copyrighted letters, as well as the unpublished letters, of which the plaintiffs are the owners.

(i) The defendants by publishing and selling THE IMPLOSION CONSPIRACY throughout the

United States and in other portions of the world injured and damaged the value, reputation, and acceptability and credibility of the Rosenberg letters heretofore published and copyrighted, as well as those not yet published and disseminated.

(j) Defendants by infringing upon plaintiffs' copyrighted property and incorporating the same in THE IMPLOSION CONSPIRACY and promoting the sale of said book on the basis thereof, thereby competed and compete with the plaintiffs' copyrighted property and impair the use and saleability of said written material now and in the future.

12. The nature of the facts that would be adduced at the trial of the action could not be ascertained or determined solely from a reading of the copyrighted material and the infringing work, but require the presentation of facts extrinsic to the published works, facts which can be presented at an evidentiary hearing and through the testimony of witnesses and the presentation of documentary evidence in connection therewith. It must be further noted that additional evidentiary material can be obtained in the course of discovery proceedings by deposition and otherwise. The deposition of the defendants Doubleday and Nizer are far from complete. There has been no deposition or discovery of defendant Fawcett. Moreover, additional

discovery must be obtained from witnesses not party to the action.

13. Except for a few months, discovery in this action has been in a state of suspense and brought about at the initiative of the defendants who wish to foreclose any discovery by the presentation of motions for summary judgment, which have been pending in this action, in the first instance from January, 1974 to July 31, 1974 and in the second instance, since January of 1975 to date. Had not plaintiffs been foreclosed from discovery by the defendants' motions and the Court's suspense of such discovery, the plaintiffs would have additional factual data to rebut any defense of fair use tendered by the defendants herein. The defendants have resorted to various tactical and procedural devices to cover up, hide their wrongdoing, and foreclose discovery.

14. Notwithstanding all of the above as set forth in this affidavit, more than sufficient evidence has already been presented in plaintiffs' papers in opposition to the motion for summary judgment in plaintiffs' General Rule 9(g) statement, to deny defendants' motions for summary judgment. The present affidavit indicates the categories and the nature of the evidence which will be adduced upon the trial of the action on

the issue of fair use, reserving to the plaintiffs the presentation of additional evidence when and if the defendants tender any factual support for their defense of fair use.

15. The evidence and factual issues raised by the plaintiffs in their papers in opposition to the motions for summary judgment create issues of fact and thus require the denial of defendants' motions. The defendants have not contested these factual issues which, if true and so considered by this Court, would require the striking of the defendants' claim and equitable defense of fair use. The sole remaining issue would be the assessment of damages.

MARSHALL PERLIN

Sworn to before me this

31st day of March, 1976.

ISADORE NATHANSON
Notary Public, State of New York
No. 24-2851680
Qualified in Kings County
Commission Expires March 30, 1977

CERTIFICATION

I hereby certify that a copy of this affidavit was served upon Satterlee and Stephens, Esqs., at 277 Park Avenue, New York, New York and upon Phillips, Nizer, Krim and Ballon, Esqs., at 40 West 57 Street, New York, New York, by hand delivering a copy of the same to their offices the morning of March 31, 1976.

MARSHALL PERLIN

TRANSCRIPT OF HEARING BEFORE
HON. LEE P. GAGLIARDI, D.J. MARCH 23, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

MICHAEL MEEROPOL and ROBERT MEEROPOL, :

Plaintiffs, : 73 Civ. 2720

v. :

LOUIS NIZER and DOUBLEDAY & COMPANY, INC., and FAWCETT PUBLICATIONS, INC., :

Defendants. :

- x

March 23, 1976,
5 P.M.

Before:

Hon. Lee P. Gagliardi,
District Judge.

Appearances:

MARSHALL PERLIN, ESQ.,
SAMUEL GRUBER, ESQ.,
MAX R. MELLMAN, ESQ.,
Attorneys for Plaintiffs.

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON, ESQS.,
Attorneys for Nizer,
By: George Berger, Esq., of Counsel.

SATTERLEE & STEPHENS, ESQS.,
Attorneys for Doubleday and Fawcett,
By: Robert M. Callagy, Esq., of Counsel

THE CLERK: Meeropol v. Nizer, [illegible] plaintiff ready?

THE COURT: Both sides are here.

MR. BERGER: Ready for the motion.

THE COURT: Gentlemen, you know that I have had this for a considerable amount of time, after it having been to Judge Tyler and Judge Pollack. I think I am fully acquainted with all the papers that have been submitted. I have a few questions of my own before I ask you to argue or present any information that you may want to. But is there anything additional, and I am asking this particularly of the plaintiffs, is there anything additional that would be presented on a trial that is not already in the papers before me?

MR. PERLIN: Do you want me to respond to that question separately?

THE COURT: I don't "separately," respond it.

MR. PERLIN: You said you had some questions.

THE COURT: Yes. I want a response to that.

MR. PERLIN: The question would be yes.

THE COURT: In the nature of what?

MR. PERLIN: Establishing in specific details, number 1, the falsity of many of the statements made in the book, the proof of the knowledge of -- the nature of

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the book, the fact that Mr. Nizer when he wrote the book knew that it was not a scholarly work, a historical work, that much of it was fictionalized and altered and not as represented by him. In terms of establishing the legitimacy or existence of the copyright --

THE COURT: That's what I want to go to first, with respect to the copyright claim. I am just curious because I don't know that there is anything additional that could be presented.

MR. PERLIN: On the question of the copyright and the title to the copyright, anything more than that we would have to add would be responding to any assaults made on the copyright on the part of the defendants.

THE COURT: I think for the purposes of the motion, they concede the validity of the copyright. Isn't that so? I don't think there is any question about that, is there?

MR. BERGER: For this motion, your Honor, certainly that is so. At the trial it would be a tremendous attack.

THE COURT: Assuming the validity of the copyright, is there anything additional that the plaintiffs would want to present to me in the way of factual matter at all?

MR. PERLIN: On the establishment of the copyright?

THE COURT: Not on the establishment, because it is

conceded. Is there anything additional that they would present on that and the question of fair use?

MR. PERLIN: On the question of fair use, which we think the burden is on the defendant to show, we would present evidence refuting their claim of any fair use being an appropriate defense in this case, because of evidence that we would establish it was not fair use under the doctrines of fair use --

THE COURT: What factual situations -- forget who has the burden or anything else. What additional information would the plaintiffs present to me in connection with the copyright cause of action, assuming, as the defendants have for purposes of this motion, the validity of the copyright?

MR. PERLIN: The knowledge on the part of the defendants that they were infringing the copyright.

THE COURT: They asked for permission, didn't they, and they didn't get it. That's conceded, and I am not sure that that is material myself as a matter of law, because if they go to you and you refuse, it doesn't make any difference if they have the right to use it in the first place. You can't gain any more rights by their having asked and their having been refused. So nothing additional can be presented on that.

MR. PERLIN: It may, as one opinion of the court may have indicated that it might relate to the extent or criteria of damages, that might be said, particularly as it applied to Fawcett, who was specifically put on notice prior to the publication of the book saying "We have this action pending." In the opinion of the Court of Appeals on our appeal fron the consolidation of the cases, the court did indicate that it was possible, but there are two criteria of damages that might be used and there may be a heavier damage imposed by reason of their knowledge and their being put on notice and still proceeding. So that's on the copyright--

THE COURT: Let me suggest this. We have got two problems with this. They are a little bit unique in this respect, that insofar as Nizer is concerned and insofar as Doubleday is concerned, there is a non-jury trial.

MR. BERGER: That's correct, your Honor.

THE COURT: I am concerned now with whether there is any additional factual issue to be presented to me in connection with this. That is substantially why I have you here. There is no dispute as to the number of words in both publications, there is no dispute or we concede the claim of the plaintiff that there is approximately 2,000 words used from the Death House Letters in the thing,

there is no dispute as to that. There is a question of a letter to Eisenhower, whether it comes within the copyright, I think that perhaps you conceded that it doesn't.

MR. PERLIN: The focus as to the fact that it only goes to the fair use question and the importance and the qualitative significance of the use of the copyright.

THE COURT: So I really don't know that there is anything additional, and that's precisely what I wanted to know, if you had anything additional in the way of factual material that would have to be presented to me on the trial of this case.

MR. PERLIN: In terms of our affirmative case, let me put it this way, if I may, your Honor, to make it clear, in terms of our affirmative case, I think that would be it. In response to --

THE COURT: In other words, I have all the papers before me that you could present in connection with your affirmative case?

MR. PERLIN: To establish that we have copyright material that was infringed upon, period, and I say having shown that, we would rest, and if any defense of burden -- that's a defense the defendants would have to show. As to any issues of what constitutes fair use as a defense, they're in light of the ground tendered by

the defendants, there would be factual issues.

THE COURT: Such as?

MR. PERLIN: Number 1, they claim that this was a scholarly study --

THE COURT: Now we are coming into questions of law. Some of these cases indicate that it could be the most amateurish, most ignorant, most ignorant person writing a letter, and still he is probably entitled to a claim of fair use.

MR. PERLIN: I would respectfully differ.

THE COURT: You don't have to be a classical writer or anything else to have the benefit of that.

MR. PERLIN: But if your justification for infringement is that I am adding something in terms of historical study to the accretion of human knowledge, and under the doctrine of fair use it was an essential part of this book, of the scholarly work, that advances things for historians, social historians and attorneys --

THE COURT: Solely to include the excerpts from the Death House Letters?

MR. PERLIN: Yes, then that on its face raises a factual issue as to the nature of the book.

THE COURT: That's your claim?

MR. PERLIN: That's right. One other aspect, as

to what use -- there are three aspects of it: The nature of the infringing work, which I dealt with, the quality of the documents that are being infringed and the way they are used in the infringing work, three, the -- and that would also include how those letters were used in this case to promote the sale and authenticate the legitimacy of the work, and, finally, the damage that it would do to the plaintiff owning the copyright. All those we say raise factual issues that cannot be determined on summary judgment.

THE COURT: I am just asking you, it is now non-jury before me as the trier of the fact insofar as Doubleday and Nizer are concerned. I am anxious to see if there is anything additional that you could present to me in the way of a factual issue, because on both -- well, I am the trier of the fact as well as on the question of law on the motion whether there is -- what else can you put to me? I read Death House Letters, I read Implosion Conspiracy, and then I determine I think as the trier of fact whether qualitatively and quantitatively there is an infringement. What else can you present to me as the trier of fact insofar as that aspect of it is concerned?

MR. PERLIN: Perhaps deferentially I will put it this way. The fact of the infringement I don't think is

in dispute, but whether the justification, the equitable doctrine of fair use, permits such an infringement without legal sanction --

THE COURT: Isn't that a question of law?

MR. PERLIN: No.

THE COURT: What factual issues are going to be put in there? That is what I can't see. You presented affidavits from scholars and others.

MR. PERLIN: We are dealing here with letters, as a category. We say that this is copyrightable material that expresses certain literary facilities in the expression of an idea. Their defense is that the only way we can write a book of such and such a quality and to give, to use their phrase, flesh to the bare bones, is to infringe because by so infringing we are giving a necessary quality to this book. So they put in issue the quality and the nature of the book which is using the material infringed upon.

THE COURT: I understand. If they quoted 20 words out of one of the letters, are you going to claim that that is a violation -- I am not going to go from there--

MR. PERLIN: No, I wouldn't use that.

THE COURT: I am trying to find out from you, really, and I haven't been able yet to pinpoint what you

claim is any additional factual matter that I am going to have to try insofar as Nizer and Doubledav are concerned.

MR. PERLIN: What I do is, you have on the quantity used, there is no dispute. On the question of where it is used in the two books, there is no dispute. Right? The dispute they say is that we have a right to use it because, A, it is de minimus in terms of quantity, and that they say -- they don't respond as to its qualitative factor or its importance in their book and how they use the letters in their book, that one they don't respond to, but they say "We are allowed to do it because of the nature of our work, the nature of our work as being a scholarly work."

THE COURT: How are you going to present anything additional to me as the trier of the fact insofar as Nizer and Doubleday?

MR. PERLIN: To establish that that book is not what they hold it out to be.

THE COURT: I have to do it by reading it. What else can you do for me?

MR. PERLIN: No, because I have to give you the facts concerning that book.

THE COURT: I have to read the book, I have to read the letters. What else is there that you can give me?

MR. PERLIN: I tell you what. For example, they say -- Mr. Nizer says I think on page 8 or 9 of his opening statement, "I have read everything there was to be written about -- to be read about this case: the trial record, I searched it as a Pulitzer Prize winner, as if I were writing a Law Review article."

You can say that was puff.

THE COURT: Whether he says it or doesn't say it, if it does or doesn't infringe, and assume that he had, that's not going to bind me as to whether qualitatively--

MR. PERLIN: But that is the only legal justification they tender for infringing. I am trying to establish that the book --

THE COURT: Go back to Rosemont, if you will --

MR. PERLIN: Let's deal with Rosemont. Number 1, that did not dismiss any action. They said those issues would be decided at a trial, but we cannot give an injunctive relief because the results are too uncertain.

THE COURT: We are not now in a position of injunctive relief. We are now in a position as to whether there is any triable issue of fact before me.

MR. PERLIN: In Rosemont they particularly itemize those issues of fact that will have to be determined on the trial, in Rosemont. Number 2, Rosemont, they were

dealing with a comparison of use of approximately -- beyond that, they were using eight lines which they said were paraphrased and two sentences exactly copied. So there is a quantitative difference between Rosemont and our present case. You say what facts do I have to produce as to that, but I am responding to your Honor when you say "Well, doesn't Rosemont deal with the question of fair use." I say it does not.

THE COURT: No, I wasn't using Rosemont for that purpose. I was using Rosemont for a different purpose. I am just asking you as to -- assume that I said "All right, we are ready for trial." What are you going to present to me?

MR. PERLIN: One of the things that we would have wanted to be able to present, and let me say this, would have probably been the depositions that we were never particularly permitted to hold to establish the falsity of the book, that it is fiction, that it was misrepresented as to its quality, and the very characteristics under which Mr. Nizer claims he was entitled to use it because it would result in an accretion of knowledge did not -- when he says he is quoting from a trial record and he falsely alters a trial record and paraphrases it falsely --

THE COURT: Then you are arguing the question

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that I think Judge Tyler indicated and perhaps is implicit in the Court of Appeals, you are arguing an issue that is not involved before me in any way.

MR. PERLIN: I don't see how you escape from it, very bluntly. I don't know what the Court of Appeals did or that Judge Tyler did, because he says that was an issue of fact, and then he says "I will let you remove on an expanded record." What is the expanded record? Let's deal with that coldly and bluntly.

Number 1, we didn't make so much money since '53 or '54 on the Death House Letters. Number 2--

THE COURT: That goes to the question of whether there is damage. I would assume that perhaps for the purposes of this motion you may have to assume that there is some damage. How much damage we don't have to establish, but you would have to assume that there is some damage.

MR. PERLIN: So the question -- there is nothing new in the expanded record on that aspect that deals with the factual issues that Judge Tyler acknowledged were present in the fair use issue.

THE COURT: Again we get back to the question, all right, you are ready for trial, call your first witness. What is your first going to say. Assume that, now.

MR. PERLIN: Probably one of our first witnesses would be Mr. Nizer.

THE COURT: To establish what?

MR. PERLIN: The fact of the falsity, inaccuracy and the nature of the infringing work in terms of fair use, from Folsom, they give three criteria clearly, the nature of the work infringed upon, the infringing work, the quantity and quality of houw it was used. On the question of the falsity, I would be using Mr. Nizer. It was one of the reasons that we wished to go further on the depositions and we never were permitted to do so.

THE COURT: I just don't know that that is going to establish anything on the issues before me, really, I don't.

MR. PERLIN: Judge, let me say this, that my understanding of fair use is that they have to give factual equitable grounds that entitles them to infringe. The infringement -- their defense is it is de minimus, they ignore the question of quality, and they say their book is of a kind which permits letters which they say are historical facts for them to infringe upon. They put into issue in their moving papers, and they had no other alternative to put that into the issue, the nature of the infringing work. When we accumulate in response to

their voluminous papers about 20-odd affidavits directed to that factual issue, and when your Honor poses to me what is the factual issue, there is none other than in response to their fair use defense.

THE COURT: You are arguing that it is not a fair and objective book or report on the trial or the post-trial procedures.

MR. PERLIN: That is not how I would formulate it, no.

THE COURT: That is what it seems to me --

MR. PERLIN: That is not what I am saying.

THE COURT: That is not an issue before me. Do you concede that is not an issue before me?

MR. PERLIN: It may be, if I could formulate it in this way. They are saying they are justified in infringing upon the material because it was an essential ingredient in a historical study of a particular case, and they had to make a contribution to future knowledge by incorporating these letters. So that puts into issue, Judge, I say, the nature of that book and whether or not it was essential to its use to incorporate those letters and as a matter of equity, which fair use is, it permits them to appropriate somebody else's property, the property here the copyrighted letters.

THE COURT: I really don't think that we have in this type of lawsuit, at least in the copyright infringement cause of action, the question of the accuracy or whether the book is biased for or against --

MR. PERLIN: I didn't say biased for or against, and that is why I was resisting your formulation of it, and that isn't the issue.

THE COURT: I don't think that's an issue in connection with the copyright infringement thing, really, I don't. That's why I am asking you what factual issues are you going to present to me. If you are going to present factual issues as to whether this is an objective and fair exposition of the trial and the events subsequent--

MR. PERLIN: Is this the character of a work which would permit and justify the infringing copyrighted material: that is the issue.

THE COURT: That I don't think is an issue in the copyright infringement. I don't know that that's an issue under the copyright infringement cause of action.

MR. PERLIN: It most certainly is, I would say, your Honor, in this respect--

THE COURT: Those are the facts that you would then present to me on a trial?

MR. PERLIN: Those are the facts that we will be

establishing, that Nizer wrote a false, biased, distorted book which misrepresented things that he knew were not fact. I am not dealing with defamation or privacy --

THE COURT: Now I have from you what the nature of your proof would be.

MR. PERLIN: That it was not of a book of this kind under the doctrine of fair use, required essential or otherwise to use the copyrighted material. Further, that the manner in which he used the copyrighted material in this book when he appropriated it was such as to do damage to the copyrighted material, not merely in terms of competition and future sales because of that aspect, because he distorted the meaning, taking out of context and misplacing chronologically and attributing certain things to these documents in the context of his book.

THE COURT: Anything else?

MR. PERLIN: One particular point, and I think it was Monday night, last night or Sunday night, I --

THE COURT: They all run together now.

MR. PERLIN: I sympathize with the problems of a court. Generally I must confess I don't, but I had to read after a long passage of time some of my briefs and I saw the typographical errors and those sort of things--

THE COURT: Don't worry about that.

MR. PERLIN: Anyhow, I notice in the first point and the focus of the first point was that the very nature of the fair use doctrine is such as to raise factual issues that are essentially inimical to disposition by summary judgment.

There is some question. I understand. I think we quoted Arnstein, a couple of other cases, Higgins, and there was a decision this past January or December by Judge Kaufman on the question of summary judgments in proceedings such as this.

THE COURT: There is a very recent Court of Appeals decision in connection with summary judgments. Let's not get into that. I merely want to know what you believe is still factually open for a trial before me. Is there anything additional after your consultation with co-counsel?

MR. PERLIN: I don't want to be silent on the question of issue, because if the action is --

THE COURT: I don't want to know about the jury issue The jury issue is only involved in Fawcett.

MR. PERLIN: I question that.

THE COURT: What question can there be?

MR. PERLIN: The question is, if the case is consolidated and you are going -- we have a jury issue insofar

as Fawcett is concerned on counts 1 and 3 --

MR. BERGER: The Court of Appeals already ruled on that.

MR. PERLIN: I don't think it has.

MR. CALLAGY: They have ruled on that very issue.

MR. PERLIN: The reason I raise the jury issue here--

THE COURT: The jury has been waived insofar as Nizer and Doubleday is concerned.

MR. PERLIN: Not as to Fawcett and not as to the supplement complaint. On --

THE COURT: The supplemental complaint, you cannot increase your right to a jury.

MR. PERLIN: Let me raise this other issue, not as to the jury.

THE COURT: I am satisfied that as to Nizer and Doubleday there is no jury. How we handle the question of Fawcett --

MR. PERLIN: I may point out that they are asking -- on the motion, here I am not dealing with the jury issue, they are asking for summary judgment on count 2 as well in the supplementary complaint.

THE COURT: Count 2 I think may be res judicata, that may have been dismissed and out of this case. I think

I am bound by Judge Tyler's decision.

MR. PERLIN: May I be heard on that point?

THE COURT: You may be heard on it, but I think I am bound by a judge of coordinate jurisdiction, having rendered an opinion in connection with that, and if it is to be reviewed, it may be my decision that's reviewed, but it is really Judge Tyler's.

MR. PERLIN: You can't review it on res judicat. for the simple reason that no final judgment has been entered.

THE COURT: Not res judicata.

MR. PERLIN: We have asked Judge Tyler, if you had examined -- I am sure you had enough of the file without having those portions, where we asked that he enter final judgment so that we could appeal under 54 and we also asked under 1292(b) that he certify the question, because he admitted in light of Gertz, which came down a month before his decision, that he may have been premature. He denied that. He denied those certifications. He also denied on the ground that there is such a common core of facts that run through all three counts, that he didn't see any need for final judgment. We went up on mandamus. The court after requesting the defendants to respond did not order the entry of a 54 or 1292(b), they

said they had never done it before and they weren't going to do it in this case,in this circuit.

THE COURT: Don't let the record be ambiguous. I am not at all critical of Judge Tyler's decision, and I am not embarrassed to have my hands bound by the fact that he has rendered the decision that he has.

MR. PERLIN: May I say, there has been a slight change, but the point that I am saying is that in this score there is no res judicata, there is no collateral estoppel, because there has been no trial on the issue of any facts.

THE COURT: You may be able to bring that up for a review in the event you lose your case. You haven't lost it at all. You can be assured of that.

MR. PERLIN: Besides Gertz, we have had two or three other Supreme Court decisions on this issue, the latest one being Firestone, and the grounds on which he denied, if I may say, in the opinion, that he granted summary judgment, was that the Meeropols were public figures under Rosenbloom v. Metromedia. If any question existed under Gertz v. Welsh, and I have the decision here in Firestone --

THE COURT: I have the Firestone decision.

MR. PERLIN: I am afraid, whether people agree

with it or not --

THE COURT: The factual situation there was completely different. That was a matrimonial matter.

MR. PERLIN: I don't know what the plaintiffs in this case were in --

THE COURT: There is no serious doubt that they have surfaced and have become public figures.

MR. PERLIN: They surfaced and became a public figure in response to the assault. That's in the record. As a result of the assault by Nizer and the other defendants, and in Firestone they deal with such a thing. They say the mere fact you then go to court and then thrust yourself on the public to respond to being defamed does not change your character. The test is at the time the invasion was made, were you a public figure at that time. The nature of the public controversy of the case is not the test. I didn't come here to argue at length that particular point--

THE COURT: You have argued far beyond what I wanted to hear.

MR. PERLIN: I am saying here bluntly as to the motion, and I want to go back to your original question, either their motion for summary judgment, if you are going to be disposed of on summary judgment, then it would have to be granting us -- would have to be granting us summary

judgment, although we didn't move, on the grounds of the insufficiency of their defense of fair use.

THE COURT: I have the right to do that, except, as I say, with respect to Nizer and Doubleday, you have got two things. You have, one, the question of summary judgment, and, two, you have the question of me as the trier of fact, whether there are any additional facts to be presented to me and whether I can -- just based on the record before me, non-jury, whether there is anything additional that's going to be presented to me. I can't see that there is.

MR. PERLIN: If you are saying, your Honor, I think in substance, that the nature of the Nizer book is something that you could determine as a matter of law, I say it cannot be determined as a matter of law.

THE COURT: As to whether it is historical work--

MR. PERLIN: Or whether or not the nature of the work was such either to justify or require the infringement upon the plaintiffs' copyrighted property. That is the issue.

THE COURT: I think the only issue before me, really, as a non-jury case, is whether qualitatively and quantitatively there is an infringement.

MR. PERLIN: If we took the question of quality,

for example, would it be pertinent or an issue of fact how they used their use of the letter in the promotion and sale of the book? If they said this book is it, because here we have the very letters that tell you how these defendants, these historically noted people feel, read these love letters in their ads, Mr. Nizer speaks at a public forum, he speaks at a book conference, publishers' conference, what is his speech about? The nature of these letters and how they are used.

THE COURT: Isn't the issue as to whether the book right on its face invades the copyright of the plaintiffs?

MR. PERLIN: They concede it invades it. They say they are justified in invading it.

THE COURT: I understand it.

MR. PERLIN: I don't think that can be determined by summary judgment, no.

THE COURT: I am not saying summary judgment. I am saying have I got before me as a non-judge all the facts that you could present?

MR. PERLIN: No, no.

THE COURT: I am still trying to find out what additional facts you could give me that I am going to have to listen to.

MR. PERLIN: The quality of the infringing work.

THE COURT: That's something that I can determine.

MR. PERLIN: No, your Honor. How are you going to determine whether this book is what Mr. Nizer says it is?

THE COURT: I don't care what Mr. Nizer says it is. I am going to look at it and see whether it is or isn't.

MR. PERLIN: Objectively it is not within legal expertise that determines what it is. If they are writing a history --

THE COURT: The fact that you label something history doesn't exclude it from being something else if it is not factual history. Labels don't mean anything if the book --

MR. PERLIN: The book is not what the defendants hold it out to be because of certain facts.

THE COURT: What you are telling me, the only additional facts that you are going to present is some activity on the part of the author subsequent to the publication of the work as to how he --

MR. PERLIN: And proof that the author knowingly, nothing to do with libel or privacy -- I want to make that clear --

THE COURT: This is subsequent to the publication of the book in describing what it is.

MR. PERLIN: I wish you would hear me, in the book he himself said he knowingly and intentionally altered the trial record. Forget whether it says guilt or innocence, I don't care. Held out certain facts to be true which he knew were not true and said that this is a result of scholarly work when it was a result actually of his imagination and fiction. In determining whether the equitable doctrine of fair use justifies the use of such a letter, such copyrighted letters, he is saying that's the justification of it because it is a scholarly work. Then Judge Tyler in his opinion says he would say that if it is a scholarly historical study that will help future historians and social scientists, that's a factor that you consider in determining fair use. If we are going to establish -- if we are going to deal with Judge Tyler's opinion that it is not any of these qualities at all, then we have to do it by adducing evidence to establish that fact. That is the evidence that we would adduce, both from persons having knowledge of the fact, some of Nizer's own writings which would establish that fact prior to the time of the publication, the alteration, the copying from other works-- for example, here he says it is a scholarly work and he copies from a tertiary source who says this is not a scholarly work. Is that going to affect the doctrine of

fair use and his justificatio- for his using it for the accretion of world knowledge of this case? I most certainly say it is pertinent to that fact. It cannot be determined by your Honor or any other judge reading it alone and making that determination, because that factual material must be presented to you to be paid by you.

THE COURT: Was that all that you would establish by way of additional facts?

MR. PERLIN: The quality of the infringement and the misuse of the copyrighted work, we would want to establish that, and also the value --

THE COURT: How would you present facts to me?

MR. PERLIN: By expert testimony as to the literary quality of the writing.

THE COURT: As a trier of the fact, I don't have to accept any expert's opinion.

MR. PERLIN: You don't have to accept it, but we may be able to adduce testimony that you may be willing to accept or not. I don't say you have to accept any evidence produced by any of the parties.

THE COURT: I don't have to permit in a non-jury case the testimony of an expert, where I don't feel it is necessary.

MR. PERLIN: We would be able to produce evidence

as to how it would be accepted in various countries throughout the world that may establish the value and importance of the document.

THE COURT: I am not sure that I would permit such experts to testify before me --

MR. PERLIN: When I say how it was accepted by people throughout the world, that's not expert, that's fact.

THE COURT: We may have to wait 25, 30, 50 years or even 100 years.

MR. PERLIN: We have waited 29 years already.

THE COURT: I had a very respected professor in college who told me he never read anything on the best seller book for, I forgot, five or ten years, because by that time he could find out whether they were or were not of any value, but by reason thereof he didn't have to read a lot of trash.

MR. PERLIN: I want to quote Judge Tyler on that, not in his capacity as a judge but in his capacity as a deputy attorney general, where he is our adversary in the Freedom of Information Act proceeding, where he acknowledged in directing the FBI and others to release these because of their historical significance of this case-- when you are dealing with the historical significance of

a case and you are talking about the two principal characters in the case, Ethel and Julius Rosenberg, and you are dealing with their letters which were published and copyrighted, I think that how those letters are appreciated in fact, let alone by expert opinion, would be pertinent for your Honor to determine, whether they had to use the artful phrases of the authors in identical language, rather than taking the substance and the information of that letter and make comment on it, which Nizer surely could have done.

THE COURT: There is no question about a certain right to quote from letters or any work.

MR. PERLIN: Any copyrighted material.

THE COURT: There is no doubt a certain permission exists, regardless of the permission or non-permission or the refusal.

MR. PERLIN: The general rule varies between 200 and 300 words.

THE COURT: Well, you --

MR. PERLIN: Well, we would like to bring evidence as to that.

THE COURT: I don't know that that is an evidentiary matter.

MR. PERLIN: I don't know whether it is a legal

matter. I know of no decision saying X words is infringement and X words is not.

THE COURT: I don't know either.

MR. PERLIN: That would be a factual issue.

THE COURT: That's a factual issue to be determined by the trier of the fact.

MR. PERLIN: We would have the opportunity to adduce the evidence and give you that evidence.

THE COURT: You can't give me any more evidence than to show me that 2,000 words were copied out of a total of 88,000. You are getting beyond what I really wanted to get down to.

MR. PERLIN: I don't want to tax you, but--

THE COURT: You are not taxing me. I am just trying to pinpoint what you say you are going to adduce as additional facts now. Maybe it is unfair that I didn't ask you this ahead of time.

MR. PERLIN: That's right. As a matter of fact, we inferentially tried to crawl into this, I think my adversaries and myself, when we were wondering--

THE COURT: My boys were excellent. They were told not to say anything at all. I didn't even have to tell them that from the beginning.

MR. PERLIN: I am not faulting them in the

performance of their duty, but--

THE COURT: I am not trying to make this a contest, because we are all trying to be enlightened by what we are doing here. We are spending the late hours of a very busy day. Perhaps you could within the next several days just formulate by a letter or anything else what you think you might present to me as factual issues that you would present to me as the trier of fact.

MR. PERLIN: All right, I will do that.

THE COURT: I know you don't need equal time. You are entitled to it.

MR. PERLIN: We have had an adversarial proceeding.

THE COURT: The other thing, I didn't get down to the further comment on Judge Tyler's decision, but that's something else again. You of course have seen that, haven't you?

MR. PERLIN: Which one?

THE COURT: You better look at Nimmer's on Copyright and the decision of Judge Tyler in connection with --

MR. PERLIN: I will take a look at it.

THE COURT: I really think you should. We have already looked at it. As you can see, there has been a great volume of material presented to me and I apologize for the length of time it's taken. Cases that are to be

decided have to be thoroughly gone into, and this is a very serious motion. A lot of summary judgment motions you can say "Motion denied, questions of fact to be tried," and this was not one of those.

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MR. PERLIN: Judge Pollack did it at one stage.

THE COURT: One stage is a provisional thing. That's the other thing I was going to ask you because all I know is that Judge Pollack, from his memorandum which he submitted to me when he sent the papers up, just indicated that summary judgment was provisionally denied. I don't believe that he denied it finally or authoritatively, or anything like that.

MR. PERLIN: I am not invoking res adjudicata.

MR. BERGER: He reinstituted it later, your Honor.

MR. CALLAGY: He called us down after he had received the motion papers and we had a conference.

THE COURT: All right.

MR. PERLIN: One other thing I do want to add, and I just didn't want it to pass by and indicate any waiver.

We were pressing like mad to proceed with depositions when this motion was made. A number of those depositions are incomplete, and they were suspended and left in a state of suspense.

We did proceed with the deposition of one person, one witness, a non-party, Otto Preminger. Other than that there were several areas that we wanted to proceed with.

They also wanted to proceed on depositions if the motions were not granted.

THE COURT: I would expect, if you get the information I have asked of you, to meet shortly,not to be more than several weeks after this thing is fully submitted to me to render a decision. I say several weeks. I mean three to four weeks at the most. So that then you can proceed with your depositions.

MR. PERLIN: The other thing, my cohorts remind me, I have other litigation relating to this case pending. When I say "relating," I mean the Rosenberg case; we have an FOI action in Washington; so purely on the question of time could we have until next Tuesday rather than the end of this week?

THE COURT: All right. But I really wish you would refine it and really indicate to me specifically, concisely and precisely as you can exactly what you think would be presented to me by way of factual matter for me to determine, and I think that relates -- well, in either event, both to the Doubleday and Fawcett case.

All right.

MR. BERGER: I will be very brief.

THE COURT: Well, I may lengthen it.

MR. BERGER: First of all, most of Mr. Perlin's

presentation orally as well as written papers went to prove, in effect, a tender of proof that he would make of the quality of the defendant's book in terms of whether it is accurate, whether it is scholarly, whether it has footnotes, whether it has an appendix.

Now, that is, in my submission, a non-issue on the question of fair use. It is not supported by a single case that Mr. Perlin refers to. In fact, it is rejected by every single case cited in our reply brief.

THE COURT: Judge Bonsal's case.

MR. BERGER: That's one of them.

But in the reply brief there are at least four cases that deal with the defendant's work, which is admittedly a a fictional work.

Now, if it's a fictional work, a fortiorari, then his defense has no application, and it is a non-legal issue. So whatever facts he is submitting on that would be ruled out as a question of law.

The second point I want to make is that he said he wanted to put Mr. Nizer on the stand to show that he had knowledge of the copyright of the Death House letter. I submit that even if he could show that, that is answered by the Geiss case in which the defendant went out and stole the copyright and material out of the files of Time Maga-

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zine, and other instances where the defendants ask for permission as in Rosemont and was refused permission. So that's a non-issue.

THE COURT: I am satisfied that that is.

MR. BERGER: Now, on the quantity of words, your Honor has assumed something less than 2000. Just for the record I would like to say that the words used involved for which there is copyright protection under the assumption of our motion is 1846. I only say that for the record so I will not have been deemed to acquiesce in the 2000.

Now, finally, the quality of [illegible], that is a question for your Honor as the trier of the facts in this case. This is not a musical work in which your Honor needs the help of experts. This is not a scientific or technical work --

THE COURT: Send those musical works to Judge owen.

MR. BERGER: I have had a few musical ones myself.

And finally I would just like to call your Honor's attention, although you may have alluded to it, that the Court of Appeals on March 3, 1976, in United States v. Mattison, spoke on summary judgment, and at page 225,

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2286 in a slip issued decision, they said:

"It is equally true that summary judgment should not be denied where the only issues raised are frivolous or immaterial ones which would only serve to provide an exercise in futility or a purposeless trial for the District Court, particularly where no jury has been demanded."

Now, your Honor may have alluded to this before but I wanted to call it to your Honor's attention in case you had not seen it.

THE COURT: All right.

MR. CALLAGY: Your Honor, I represent the defendants Doubleday and Fawcett, and earlier your Honor had made a distinction between Doubleday and Fawcett, and I just want to correct it for the record. Fawcett, of course, has moved on the very same grounds as Nizer and Doubleday, and, further, Fawcett has moved to dismiss the libel and the privacy claim based on Judge Tyler's earlier decision, because Fawcett is simply the publisher of the paperback edition, and nothing that the plaintiff can bring out in its affirmative case against Doubleday where Nizer can be any different as against Fawcett.

Just backing up what Mr. Berger had to say, one case in which my firm has been particularly involved,

which holds that a completely fictitious work is entitled to the protection of fair use. That is the Green v. Denoble case. We worked on that for many years and your Honor is familiar with the decision.

Finally, as far as Fawcett is concerned as well, your Honor would be the trier of the equitable defense of fair use, and no jury will pass on that question.

So, your Honor, as far as we are concerned, we submit that the motion should be granted on behalf of all three defendants in this case.

THE COURT: You say the plaintiff is not entitled to a jury trial?

MR. CALLAGY: On fair use, yes.

THE COURT: On fair use?

MR. CALLAGY: It is for you to decide, your Honor. It is an equitable defense.

MR. PERLIN: An equitable defense does not take away a jury.

THE COURT: I don't know. You know, it is one of those things that you assume, and I would have to look at it further, but I had assumed as to Fawcett a jury trial was necessary to see whether or not qualitatively and quantitatively there would be an infringement.

MR. CALLAGY: The jury may decide the infringe-

ment, but as far as the equitable defense of fair use, that would be for the Court to decide.

THE COURT: I don't see that. You can enlighten me if you would.

MR. CALLAGY: Why don't I do that and submit some authority on that point to the Court.

THE COURT: I am just assuming, just on general legal principles and common sense, that they are entitled to a jury; as to Fawcett they are entitled to a jury trial.

MR. CALLAGY: No. My understanding is not, and I will submit something to the Court.

THE COURT: Can you do this: Ican you respond to whatever they give me by Tuesday, can you give me your response by Friday?

MR. CALLAGY: This Friday?

THE COURT: No. This is next Tuesday. A week from today they are going to submit their papers, and all I want to know is the factual thing, and not the legal, and maybe you could by Tuesday give me something on the question of whether or not they are entitled to a jury trial on the equitable defense of fair use, because, frankly, I had assumed that, certainly, they are entitled to a trial by jury on that, which I had thought would be a monstrosity because it would require each juror to read both the Death

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House letters and The Implosion Conspiracy, and I am very happy with our jury system; I am very happy with the cross-section of the community that we get here, but I submit to you that some of our jurors would not be able to read very much of either of those works, and it presents a very interesting question, should I deny their motion for summary judgment and you could have a couple of situations here. I am not indicating to you what I am going to decide, but if I assume there are no additional factual issues involved, other than the factual issues that they indicate to me that they are going to present, permit me just on the basis of the papers submitted to determine this case non-jury on the basis of everything that is submitted to me, you might have the anomaly situation of me deciding non-jury that there was no cause of action against Nizer and Doubleday, and have to submit to a jury as a question of fact by presenting to them both works and let them make the determination factually as to whether qualitatively and quantitatively there was an infringement.

MR. PERLIN: There is an easy resolution. Give it all to the jury.

THE COURT: Well, I am not permitted to do that. The jury is waived, as far as I understand it.

MR. PERLIN: You have thepower within your dis-

cretion.

THE COURT: Well, has that motion been made? I don't know. But I am not encouraging the making of any additional motions.

MR. PERLIN: I didn't think so.

Your Honor, should our papers come in in letter form or on formal papers?

THE COURT: Well, make it by affidavit. I think that would complete the record.

MR. BERGER: Can we be served personally so that we could respond by Friday?

THE COURT: All they are going to submit to you -- and I don't know that it requires you for your memorandum -- you are submitting a memorandum of law to me.

MR. BERGER: Yes.

THE COURT: You don't have to know what they are going to put in by way of any factual situation, so you don't need to see theirs before you submit it to me.

But I would like you to get it in to me as soon as you can, and if you want to respond to whatever you get by Tuesday, you have until Friday to do it. If you get your memorandum to me on or before Tuesday with respect to the Fawcett issue which you have raised, they will respond to that by the following Friday,

legally, and then we will have the matter fully submitted finally.

All right, thank you, gentlemen. Sorry to keep you so late.

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OPINION OF HON. LEE P. GAGLIARDI, U.S.D.J. DATED JULY 20, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Plaintiffs,

-against-

LOUIS NIZER, DOUBLEDAY & COMPANY, INC. and FAWCETT PUBLICATIONS, INC.,

Defendants.

73 Civ. 2720

OPINION

- -x

A P P E A R A N C E S :

MARSHALL PERLIN, ESQ.
Attorney for Plaintiff
36 West 44th Street
New York, N.Y. 10036

PHILIPS, NIZER, BENJAMIN, KRIM & BALLON, ESQS.
Attorneys for Defendant Nizer
477 Madison Avenue
New York, N.Y. 10022

SATTERLEE & STEPHENS, ESQS.
Attorneys for Defendants
Doubleday & Company, Inc. and
Fawcett Publications, Inc.
277 Park Avenue
New York, N.Y. 10017

GAGLIARDI, D. J.

This is a copyright infringement and invasion of privacy suit by Robert and Michael Meeropol against Louis Nizer ("Nizer"), author of the book The Implosion Conspiracy, Doubleday & Company, Inc. ("Doubleday"), the book's hardcover publisher, and Fawcett Publications, Inc. ("Fawcett"), the paperback publisher. The complaint alleges that The Implosion Conspiracy, which is about the espionage trial and conviction of Julius and Ethel Rosenberg, the plaintiffs' natural parents, invades the plaintiffs' privacy and infringes on common law and statutory copyrights they hold on letters their parents wrote while in jail awaiting execution.

Three opinions have already been rendered in this case by former Judge Harold R. Tyler, Jr: the first denied a preliminary injunction on the copyright claim on the ground that the plaintiffs had not shown a substantial likelihood of success, 361 F. Supp. 1063 (S.D.N.Y. 1973)[1]; the second, which was subsequently affirmed by the Court of Appeals, stayed a similar action brought by plaintiffs in Connecticut against Fawcett on condition that Fawcett intervene in this action, 73 Civ. 2720 (April 3, 1974) (unreported) aff'd 505 F.2d 232 (2d Cir. 1974); the third dismissed on the merits without leave to

replead plaintiffs' invasion of privacy and defamation claim. 381 F. Supp. 29 (S.D.N.Y. 1974). Plaintiffs have served a supplemental complaint including the same invasion of privacy claim in slightly different language. Defendants now move for summary judgment dismissing plaintiffs' complaint in its entirety.

While complete familiarity with all Judge Tyler's opinions is necessary for a full understanding of the issues here involved, the following extracts from the first opinion set forth the basic facts:

> Plaintiffs are the natural children of Julius and Ethel Rosenberg, who were executed in June, 1953 after their trial for treason in this court. Their complaint, filed on or about the same day as the present motion, sets out three separate claims: (1) for statutory copyright infringement pursuant to 17 U.S.C. §101, with a prayer for permanent injunctive relief; (2) for damages of $1,000,000 for malicious defamation and invasion of plaintiffs' privacy through the publication of The Implosion Conspiracy; and (3) for money damages of $1,000,000 for common law infringement of and for injury to plaintiffs' property rights in unpublished and uncopyrighted works of their parents. Alleging diversity of citizenship, plaintiffs assert that this court has jurisdiction of the second and third claims pursuant to the provisions of 28 U.S.C. § 1331. . . In essence, it is charged that Nizer in his book quoted all or portions of some 29 letters of Ethel and Julius Rosenberg, which appeared in the book Death House Letters of Ethel and Julius Rosenberg, copyrighted in the United States in 1953 by the Jero Publishing Company, Inc. ("Jero").[2]
>
> * * * * *
>
> Nizer and Doubleday contend, inter alia, that the challenged quotations con-

stitute fair use of the material, that a significant part of the allegedly infringed material, if not all of it, is already in the public domain, that the plaintiffs are not the true copyright owners as asserted, and that they are barred by laches from bringing this action.

* * * * *

The Implosion Conspiracy has enjoyed considerable popular success since its publication in February [1973]. In essence, it purports to be a factual but readable account of the trial and post-conviction legal proceedings in the celebrated Rosenberg case. A subordinate but nevertheless important theme of the author, as I understand his work, centers upon legal efforts of Emanuel Bloch and his total professional and emotional dedication to his clients, Julius and Ethel Rosenberg. Although the plaintiffs apparently claim otherwise, my reading of the book indicates that by and large it is a sympathetic and sensitive account of the Rosenbergs' personal, political and legal problems during the years of the trial and post-conviction appeals.

The parties agree that Death House Letters has been out of publication for almost twenty years.

* * * * *

. . . for the purposes of this motion, plaintiffs, in my view, have made a sufficient offer of proof that they are the equitable, if not legal, owners of the statutory claim. . . .

Nonetheless, upon evaluation of the entire record before the court, I conclude that the plaintiffs cannot meet their burden of establishing likelihood of success in this case. . . .

A major reason for concluding that the plaintiffs have fallen short of showing likelihood of success is the fair use defense raised by the defendants. . . .

* * * * *

. . . the continuing interest in and importance of the celebrated Rosenberg case probably entitles the defendants' new book to invocation of the fair use doctrine. . . .

Plainly, as defendants concede, The Implosion Conspiracy was designed and has been sold as a trade book for commercial gain. . . . The book's commercial success, however, is no reason to conclude that it should be denied the benefits of the fair use doctrine. As I read The Implosion Conspiracy, the quotations were used with discretion and with demonstrable purpose to illustrate, from an historical and legal point of view, the post-conviction appeals and petitions for clemency which were filed by and for Mr. and Mrs. Rosenberg. The relevant portions of the book almost certainly will provide reasonably valuable source material for future historians, biographers and social scientists. Indeed, the conceded fact that the letters have been out of publication here and abroad for almost twenty years, in my view, tends to enhance the likelihood that defendants can prove fair use of the letters in question. Thus, defendants are likely to prove that their book is a serious, full and readable account of what was a trial of great historical interest; that resort to quotations of certain of the Rosenbergs' letters is important to any serious book on their trial; and that there is little possibility of injury to the plaintiffs. Indeed, defendants may be able to show that their book has enhanced the value of plaintiffs' copyright. . . .

* * * * *

In their papers opposing plaintiffs; motion, defendants have suggested and indeed urged that the record is sufficient for this court to dismiss the first claim on this ground. But "fair use" would seem to be a function of all of the circumstances, and plaintiffs should have the opportunity to rebut the presumption that arises from the nature of the materials and the circumstances described herein. It is not altogether clear that letters stand on the same footing as "historical facts", which are the product of

> research and in turn form the basis for subsequent works. See Rosemont, supra. And the relatively slight quantitative significance of the quotations perhaps overstates their qualitative impact. Defendant Nizer, moreover, is a lawyer; he knew about Death House Letters and its copyright, yet made only one somewhat ambiguous attempt to obtain permission to cite the letters in his book. Finally, although this is not stressed by the parties, it appears that defendant Doubleday published another book, Invitation to an Inquest. In the original version of that book, excerpts of certain of the Rosenberg letters appeared; but there is evidence that Doubleday would not permit such use unless written consent was obtained. Thus, it would seem that both defendants were well aware of the potential copyright infringement represented by quotations of the letters in The Implosion Conspiracy. Accordingly, defendants' motion to dismiss the first claim is denied without prejudice.
>
> To summarize, then, the plaintiffs' motion for temporary injunctive relief is denied in all respects; further, the defendants' cross motion to dismiss the first stated claim in the complaint is denied without prejudice to renewal thereof upon an expanded record. 361 F. Supp. at 1065, 1067-68, 1070.

The defendants now renew their motion for dismissal of the complaint on the basis of an "expanded record."

I. Invasion of Privacy and Defamation Claim

Before discussing the other issues raised by the present motion it is well to dispose of the restated invasion of privacy and defamation claim. As this claim was previously dismissed without leave to replead by Judge Tyler, it is not properly before this court at this time. The supplemental complaint merely repleads and embellishes

the allegations of the original complaint with respect to this claim in slightly more colorful language. Any new allegations in the supplemental complaint were previously considered and rejected by Judge Tyler at the time of the original dismissal of the claim. Count II of plaintiffs' supplemental complaint must thus again be dismissed on the ground of law of the case.

II. Copyright Claims

The defendants have expanded the record by providing (1) financial statements of Jero Publishing Co. and the Rosenberg Children's Trust Fund, showing no income from the Death House Letters after 1957 and (2) examples of 16 biographical and historical works containing excerpts of letters used to illustrate and explain historical events. Plaintiffs have expanded the record with (1) affidavits of college history professors and authors of other books about the Rosenberg trial stating that The Implosion Conspiracy is of no historical value, and (2) Nizer's marked copies of those other works about the trial which allegedly indicate the extent of Nizer's reliance on those authors' research.

For the purposes of this motion, the defendants concede copying certain portions of letters covered by plaintiffs' copyright, but assert the right to do so under the "fair use" doctrine. In opposition, plaintiffs vig-

orously assert that summary judgment is inappropriate since the applicability of the fair use doctrine is a factual question which can only be determined at trial.

A. The Fair Use Doctrine

Defendants admit that The Implosion Conspiracy contained verbatim portions of some 28 letters -- amounting to a total of 1957 words -- which previously appeared in copyrighted editions of the Death House Letters.[3] They argue, however, that the amount of copying was relatively insubstantial in the context of the total work -- approximately .85% of the 228,900 words in The Implosion Conspiracy and 2.4% of the 80,000 word Death House Letters. Defendants assert that given the historical nature of The Implosion Conspiracy and the nature and use made of the letters in that work, any copying of copyrighted material is sufficiently limited to bring it within the protection of the fair use doctrine. Although the defendants' claim raises difficult questions in a difficult area of the law, on the basis of the record before it this court agrees that the doctrine of fair use should be applied to this case.

The concept of fair use is founded on "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his

consent, notwithstanding the monopoly granted to the owner." Ball, Copyright and Literary Property 260 (1944); Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1957). The exact scope and limits of the doctrine are not clearly defined, with each case resting on its own specific facts--a situation which has led some commentators to call the doctrine "the most troublesome in the whole area of copyright." 1 Nimmer on Copyright § 145 at 644 (1972); Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939); See Time Inc. v. Bernard Geis Associates, 293 F. Supp. 130, 145 (S.D.N.Y. 1968), citing, H.R. Rep. No. 83, 90th Cong., 1st Sess. 29-30 (1967) ("since the doctrine in an equitable rule of reason, no generally applicable definition is possible"). Nevertheless, the vitality of the doctrine is now well established as courts in recent years have come to recognize that there are occasionally situations in which the copyright holder's interest in a maximum financial return must occasionally be subordinated to the greater public interest in the development of art, science and industry. Berlin v. D.C. Publications, Inc., 329 F.2d 541, 544 (2d Cir. 1964), cert. denied, 379 U.S. 822; Rosemont Enterprises v. Random House, Inc., supra at 307. Although such situations cannot be easily defined in advance, in determining whether the use of copyrighted material constitutes a "fair use" the courts gen-

erally must consider the following four factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the copyright owner's potential market for and value of his work. Williams and Wilkins Company v. United States, 487 F.2d 1345, 1352 (Ct. Cl. 1973), aff'd per curiam 420 U.S. 376 (1975); Time Inc. v. Bernard Geis Associates, supra at 145. In evaluating these factors, an extremely important consideration is the public interest served by the use of the copied materials and by the copying work itself. In Rosemont Enterprises, Inc. v. Random House, supra, the leading Second Circuit case on fair use, the Court thus stated:

> . . . whether the privilege may justifiably be applied to particular materials turns initially on the nature of those materials, e.g. whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently the privilege has been applied to works in the fields of science, law, medicine, history and biography." 366 F.2d at 307

In this case plaintiffs claim summary judgment should not be granted because substantial issues of fact exist as to (1) whether the defendants' book is a historical work entitled to the protection of the fair use doctrine, (2) the quantitative and qualitative significance of the copied material to the defendants' work, and

(3) the effect of defendants' use of the copied materials on the market for the copyrighted work.

B. Summary Judgment

In their original papers, plaintiffs placed primary reliance on Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1956), a copyright case in which Judge Frank found summary judgment to be inappropriate despite an almost overwhelming showing that there was absolutely no substance to the plaintiff's claim. In the period since this motion was submitted, the Second Circuit has come down with a series of decisions outlining the standards to be applied in motions for summary judgment. Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317 (2d Cir. 1975); Judge v. City of Buffalo, 524 F.2d 1321 (2d Cir. 1975); Jaroslawicz v. Seedman, 528 F.2d 727 (2d Cir. 1975); Zolar Publishing Company, Inc. v. Doubleday & Company, Inc., 529 F.2d 663 (2d Cir. 1975); Home Insurance Co. v. Aetna Casualty and Surety Co., 528 F.2d 1388 (2d Cir. 1976); United States v. Bosurgi, 530 F.2d 1105 (2d Cir. 1976); Chanofsky v. Chase Manhattan Corp., 530 F.2d 470 (2d Cir. 1976); United States v. Matheson, Dkt. No. 75-6062 (2d Cir. March 3, 1976) slip op. 2279; Williams v. McAllister Brothers, Inc., Dkt. No. 75-7209 (2d Cir. April 6, 1976) slip op. 305[illegible]. In Heyman v. Commerce and Industry Insurance Co., the earliest of

these recent cases, the Court questioned the continuing validity of Arnstein v. Porter stating:

> Although for a period of time this Circuit was reluctant to approve summary judgment in any but the most extraordinary circumstances see, e.g., Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946), that trend has long since been jettisoned in favor of an approach more in keeping with the spirit of Rule 56. 524 F.2d at 1319.

The Court, however, went on to say:

> But the "fundamental maxim" remains that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried. American Manuf. Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272, 279 (2d Cir. 1967); Cali v. Eastern Airlines, Inc., 442 F.2d 65, 71 (2d Cir. 1971). Moreover when the court considers a motion for summary judgment it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, United States v. Diebold, 369 U.S. 654, 655 (1962), with the burden on the moving party to demonstrate the absence of any factual issue genuinely in dispute... 524 F.2d at 1320.

These principles have been reaffirmed in other subsequent recent Second Circuit cases dealing with this issue. Jaroslawicz v. Seedman, supra at 731; Zolar Publishing Co., Inc. v. Doubleday & Company, Inc., supra at 666; Chanofsky v. Chase Manhattan Corp., supra at 472-73; United States v. Bosurgi, supra at 1110; United States v. Matheson, supra at 2285; Williams v. McAllister Brothers, Inc., supra at 3054. At least two of these cases, however, have upheld a grant of summary judgment where

it was clear that there was no genuine factual dispute relevant to the issue for decision. In United States v. Matheson, for example, where the issue was the citizenship for tax purposes of a wealthy decedent, the Court found that summary judgment was proper despite the contention that there was a factual question as to whether the decedent had renounced her American citizenship. The Court reviewed with approval the holding in Heyman and then stated:

> Only if no material factual issues exist may summary judgment be granted. However, it is equally true that summary judgment should not be denied where the only issues raised are frivolous and immaterial ones which would simply serve to provide an exercise in futility or a purposeless trial for the district court, particularly where no jury has been demanded. See Beal v. Lindsay, 468 F.2d 287, 292 (2d Cir. 1972); Houghton Mifflin Co. v. Stackpole Sons, Inc., 113 F.2d 627, 628 (2d Cir.) cert. denied 308 U.S. 597 (1940).

This principle was also applied in a seaman's personal injury action in Williams v. McAllister Brothers, Inc., supra at 3055.

These recent cases indicate that to succeed on this motion defendants must show that there are no genuine issues of fact to be tried. However, the mere fact that a determination of the fair use question requires an examination of the specific facts of each case does not necessarily mean that in each case involving fair use there are factual issues to be tried. Undoubtedly, in many cases there are dis-

puted factual questions crucial to the resolution of the fair use issue which can only be resolved at trial. In such cases, courts have properly denied summary judgment. Higgins v. Baker, 309 F. Supp. 635 (S.D.N.Y. 1970); Consumers Union of United States, Inc. v. Hobart Mfg. Co., 199 F. Supp. 860, 861 (S.D.N.Y. 1961); Cf. MacDonald v. DuMaurier, 144 F.2d 696, 701 (2d Cir. 1944). On the other hand, in other cases involving the fair use doctrine where the facts were not seriously in dispute or the disputed facts would not affect the decision even if found adversely to the moving party, summary judgment has been granted. Berlin v. E.C. Publications, Inc., supra; Gardner v. Nizer, 391 F. Supp. 940 (S.D.N.Y. 1975); Time, Inc. v. Bernard Geis Associates, supra; Karll v. Curtis Publishing Co., 39 F. Supp. 836 (E.D. Wisc. 1941); Broadway Music v. F-R Publishing Corporation, 31 F. Supp. 817 (S.D.N.Y. 1940). In such cases, a full trial by the district court would be a purposeless exercise in futility. United States v. Matheson, supra; Williams v. McAllister Brothers, Inc., supra.

Plaintiffs here argue that there are significant factual issues for trial, but a careful examination of the record before this court indicates a skillful attempt by plaintiffs to manufacture factual issues for trial where in reality none exist. The issues as to which plaintiffs claim there are factual questions in this case are either

not in dispute or are such that even if resolved in plaintiffs' favor the ultimate decision on the fair use question would not be affected.

Plaintiffs submit 14 affidavits from professors of history at leading universities and writers of other books about the Rosenberg trial stating in essence that The Implosion Conspiracy is riddled with distortions and inaccuracies and thus has no historical value. Through the testimony of these purported experts, plaintiffs claim that at trial they will be able to show that the defendants' book is not a historical work and thus is not entitled to the protection of the fair use doctrine. While plaintiffs' voluminous and vehement submission on this point gives the distinct impression that what is really desired is a trial of the accuracy and fairness of defendants' book and its implicit conclusion that the controversial Rosenberg trial was fair -- an issue on which history alone must provide the final judgment -- plaintiffs apparently do not fully understand the minimal standard which must be met in order for a work to be entitled to fair use protection. Even assuming plaintiffs' experts are correct that defendants' work is grossly inaccurate and distorted and lacking in even the minimum indicia of serious, scholarly historical research, it is not precluded from invoking the protection of the fair use doctrine. Rosemont Enterprises, Inc. v. Random House, supra indicates that the definition of a

scientific or historical work for purposes of the fair use doctrine is a very broad one. In Rosemont, the Court of Appeals reversed the district court's holding that the fair use privilege applies only to scholarly works written for scholarly audiences and found that a commercial biography of Howard Hughes was entitled to fair use protection. The Court there stated:

> . . .Indeed while the Hughes biography may not be a profound work, it may well provide valuable source material for future biographers (if any) of Hughes or for historians or social scientists. Contrary to the district court's view, the arts and sciences should be defined in their broadest terms. . . particularly in view of the development of the field of social sciences. . . .
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> * * * * *
>
> . . .Thus we conclude that whether an author or publisher has a commercial motive or writes in a popular style is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use. 366 F.2d at 307.

In order to be a "historical" work for the purposes of invoking the fair use doctrine, defendants' book thus need not evidence even a minimum scholarly effort or be in the form prescribed by academic historians, as plaintiffs' experts apparently believe. Rather all that need be shown is that there be some serious attempt to describe a historical event which could be of some benefit to the public at large. Whether the work here in question which must be determined by the court primarily

on the basis of an examination of the work itself.

As previously noted, by Judge Tyler, The Implosion Conspiracy is primarily an analysis of the Rosenberg trial and the post-conviction legal proceedings.[4] The author of the book - Louis Nizer - has a reputation as a leading trial lawyer. Even if, as plaintiffs contend, the book is filled with errors and completely devoid of independent research, this court believes that, as a matter of law, a purportedly serious work by one with Nizer's reputation and experience as a trial lawyer about a famous and controversial trial is of some public benefit and thus a historical work entitled to claim the protection of the fair use doctrine. The affidavits by the plaintiffs in no way raise a genuine issue of fact as to this question; rather, they indicate either a misunderstanding of the legal definition of a historical work for purposes of the fair use doctrine or that there may be disputed factual questions as to issues irrelevant to the determination of whether the defendants' book falls within that definition. The affidavits of many of plaintiffs' experts indicate that in fact even they would concede that defendants' book meets this minimal legal standard.[5]

Plaintiffs also claim that they will be able to prove at trial that defendants' work has reduced the potential market for future publications of the Rosenberg letters and that the amount of material copied by the

defendants is quantitatively and qualitatively substantial. While plaintiffs have yet to come forward with one iota of evidence indicating that The Implosion Conspiracy has in any way damaged the market for the Rosenberg letters,[6] it is possible that plaintiffs at trial would be able to prove such damage. For purposes of this motion, therefore it must be assumed that the defendants' book diminished the value of plaintiffs' copyrighted letters. This fact alone, however, is not in this court's view sufficient to preclude the defendants from claiming fair use. While the impairment of the commercial value of the copyrighted work is a factor to be considered, a copying may be sufficiently limited or otherwise privileged so as to be entitled to fair use protection.

Plaintiffs' claim that there are disputed factual issues as to whether the amount of copying in defendants' work is qualitatively and quantitatively substantial raises more difficult questions, as this claim goes to the heart of the fair use defense. Undoubtedly, whether a given amount of copied material is "substantial" is in some sense a factual question; it is not, however, necessarily an issue as to which there are factual questions to be tried. Accepting plaintiffs' claim as to the amount of material copied as true, as must be done on the present motion, what is in dispute is not the extent of copying but rather the legal conclusion to be drawn from the admitted amount

of copying. With both works before the court and the amount of copying undisputed, the question arises whether under the circumstances here there is any evidence that could be presented at trial which might ultimately affect the determination as to the qualitative or quantitative importance of the copying.

Plaintiffs argue that this determination cannot be made solely from a reading of the two works. In papers filed at the court's request after supplemental argument, plaintiffs claim they will adduce at trial evidence extrinsic to the infringing and copyrighted works showing the importance of the copyrighted materials. However, most of the evidence which plaintiffs say they will introduce at trial relates to issues that for purposes of this motion are either not in dispute or not relevant to the fair use question. Recognition of the literary quality of the Rosenberg letters, for example, is not really disputed; as noted above in this case the historical accuracy of defendants' book or the amount of independent research that went into its preparation is not relevant. The other evidence which plaintiffs indicate they would introduce at trial even if unchallenged would not in this court's view affect the decision on the fair use question. The fact that the defendants may have used copied materials in the promotion of their work does not in itself prove that the copied materials are important to the work itself. Simi-

larly, the alleged standard rule in the publishing industry in the United States that use of more than 300 words of a copyrighted work does not qualify as a fair use, even if such a rule exists, is not dispositive of the fair use question. Fair use is a legal question to be determined by the court not by alleged industry practice.

Plaintiffs also imply that they can present expert testimony presumably by literary authorities that would establish the quantitative and qualitative importance of the letters to the copyrighted and infringing works. Under Rule 702 of the Federal Rules of Evidence such expert testimony is permissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." The admission or exclusion of such testimony is a matter within the sound discretion of the trial court. Salem v. United States Lines, Co., 370 U.S. 31, 35 (1962); Capri Jewelry Incorporated and Tancer & Two, Inc. v. Hattie Carnegie Jewelry Enterprises, Ltd. and James, Dkt. 75-7604 (2d Cir. May 26, 1976) slip op. 3865, 3870; Keystone Plastics, Inc. v. C&P Plastics, Inc., 506 F.2d 960, 966 (5th Cir. 1975); see also Butkowski v. General Motors Corp., 497 F.2d 1158, 1159 (2d Cir. 1974); Stevenson v. United States, 378 F.2d 354 (2d Cir. 1967).

Although there may be fair use cases in which, because of the technical nature of the materials or other

factors, such testimony is useful, this court does not believe that expert testimony on the qualitative impact of the Rosenberg letters in The Implosion Conspiracy would assist the trier of fact in determining the fair use question, and therefore it would not admit such testimony at trial. The work to be evaluated in this case dealt with a famous and controversial trial held in this district approximately 25 years ago. This court, or a jury, is fully competent to understand the subject matter of the work and to evaluate the qualitative importance of certain materials to the presentation of that subject. In a case like this the importance of the copied materials must be determined primarily by an examination of the copyrighted and infringing works themselves. There is thus no factual question to be tried with respect to this issue.

That there is no question to be tried as to whether the amount of copying is qualitatively or quantitatively substantial does not, however, mean that there is no factual issue to be resolved as to this issue. Certainly, the qualitative impact of the copied material -- i.e., its importance to the work -- may present an issue as to which reasonable men can disagree, even though the basic quantity of the infringement and all the other surrounding circumstances are undisputed.[7] Under these circumstances, the ultimate resolution of the issue must

turn on the subjective judgment of the trier of fact, and thus the standards to be applied on a motion for summary judgment may well be more stringent in a case in which the issue is to be submitted to a jury than in one in which a jury has been waived. As discussed in more detail below, in this case there is the somewhat anomalous situation that the plaintiffs have waived a trial by jury as to the defendants Nizer and Doubleday, but not as to the defendant Fawcett. The standard to be applied to the defendant Fawcett's motion for summary judgment thus may be different from that to be applied to Nizer and Doubleday's motions, even though each defendant may be entitled to summary judgment.

C. Application of the Fair Use Doctrine to These Letters

Turning finally to the substantive question of whether in the circumstances of this case the use of plaintiffs' copyrighted letters in defendants' book is a fair use, this court must first determine the extent of copyright protection available to letters written by historical figures about public events. On the motion before him, Judge Tyler expressed uncertainty as to whether letters stand on the same footing as "historical facts" which are the product of research and in turn form the basis for subsequent works. 361 F. Supp. at 1070. Defendants submit examples of 16 different biographical

and historical works in which excerpts from letters by historical figures are used to document, support and substantiate the authors' theories and conclusions about historical events, but apparently in none of these works were the excerpted letters subject to the copyright of someone who objected to their use.

Here the plaintiffs contend that the copyrighted letters constitute their parents' individual intellectual product and that the letters have high literary value which the defendants should not be permitted to appropriate in violation of their copyright. The problem is that the Rosenbergs' letters are also part of the historical record of events relating to the trial. Only in these letters do the Rosenbergs so fully set forth their thoughts and feelings about the events of which they were a significant part. Those thoughts and feelings are historical facts relating to the trial which may be directly relevant to a history of the events surrounding it.

It is not sufficient, as plaintiffs suggest, for the defendants who wished to describe the Rosenbergs' thoughts and feelings to resort to "the obvious device of not quoting them directly." To do so would have prevented them from fully and accurately conveying the Rosenbergs' own expression, which in this situation may be essential to an accurate rendition of the relevant thoughts themselves.[8] Furthermore, the Rosenbergs' expression itself may be a relevant part of the history relating to the case.

The Rosenbergs' rights in their own expression thus must be balanced against the public interest of historians and others in freely disseminating information about them and their reactions to the trial.

While famous individuals have long been considered to have rights with respect to the publication of their letters, Baker v. Libbie, 210 Mass. 599, 606, 97 N.E. 109, 112 (1912); Philip v. Pennell, 2 Ch. 577, 590 (1907). Note, Personal Letters: In Need of a Law of their Own, 44 Iowa L. Rev. 705 (1959); Cf. Estate of Hemingway v. Random House, Inc., 53 Misc. 2d 462, 279 N.Y.S.2d 51, 58 (Sup. Ct. 1967) aff'd mem. 29 A.D.2d 633, 285 N.Y.S.2d 568 (1st Dep't 1967), aff'd 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771, 777 (1968), the question of whether limited parts of those letters can be copied verbatim in a historical work dealing with an event in which the writer was a major participant has rarely arisen. Folsom v. Marsh, 9 Fed. Cas. 342, Fed. Cas. No. 4,901 (1841) appears to be the only American case which discusses this issue directly. There Justice Story outlined the then recently developing doctrine of fair use. In that case it was held that copyrighted letters of George Washington could not be republished in their entirety in a work on Washington's life where 255 pages of the 866 page infringing work consisted of copyrighted material. Justice Story therefore clearly

found that the letters of a historical figure are at least to some extent entitled to copyright protection -- even where the infringement is in a historical work. He also specifically rejected the defendant's claim that the limited use of the letters as part of a historical work constituted fair use -- finding that "if the value of the original is sensibly diminished or the labors of the original author are substantially appropriated" there could be no fair use. It should be noted, however, that Folsom v. Marsh involved a situation in which the copyrighted letters were a very substantial portion of the infringing work. Justice Story at the end of his opinion stated:

> It is not a case where abbreviated or select passages are taken from particular letters; but the entire letters are taken, and those of most value to the public. . . . If it had been the case of a fair and bona fide abridgement of the work of plaintiffs, it might have been admitted of a very different consideration.

By contrast, the use of copyrighted letters by defendants here is much more limited. The copyrighted letters appear in the latter part of defendants' book in passages describing the experiences of the Rosenbergs while awaiting execution -- particularly their reactions to the various legal proceedings. As Judge Tyler noted, the quotations are used "with discretion and with demonstrable purpose to illustrate from a historical point of view, the post-conviction appeals and petitions for clem-

ency which were filed for Mr. and Mrs. Rosenberg." 361 F. Supp. at 1068. The defendants' book seeks to describe the trial and its effects on the major participants. The letters are used by the defendants to illustrate and describe the impact of the trial on the Rosenbergs in the period after their conviction, as well as to convey their thoughts and feelings about the post-conviction legal proceedings. While not substantial in the context of the total work, the amount of copyrighted material used is more than insignificant. However, the letters do not in any sense form a major part of defendants' work.9

Under these circumstances, the character and purpose of the use and the nature of the defendants' work are the primary factors that must be considered in determining whether the Rosenbergs' property interest in the letters should be subordinated to the public interest in their dissemination by the defendants. This court believes that the relevant test for a fair use of historical letters should be (1) whether the taking is limited in scope, and (2) whether in the context of the entire work it appears that the purpose of using the letters is to illustrate historical facts with which the work deals rather than to capitalize on the unique intellectual product of the person who wrote them.

The application of this test to this case is complicated by the fact that a jury trial has been waived

as to the defendants Nizer and Doubleday, but not as to Fawcett. Fawcett contends that since the defense of fair use is an equitable defense, plaintiffs are not entitled to a jury trial on the question of fair use in any event. In this case, however, the plaintiffs are clearly seeking money damages for losses they allegedly incurred as a result of defendants' purported infringement. This is a legal claim as to which they are entitled to a trial by jury. The fact that the defendants interpose a defense which they denominate as an "equitable defense" does not deprive the plaintiffs of their right to have a jury determine the merits of their claim if the case is otherwise appropriate for submission to a jury. See Ross v. Bernhard, 396 U.S. 531, 538-39 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472-73 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).[10] Here, the Court of Appeals in its opinion affirming Judge Tyler's stay of the Connecticut action has already specifically found that plaintiffs have not waived their right to a jury trial with respect to Fawcett. 505 F.2d at 238. Therefore, if there is to be a trial in this case, with respect to Fawcett, plaintiffs are entitled to have all issues appropriate for determination by the trier of fact determined by a jury.

However, even where there is a right to a trial by jury, the applicability of the fair use doctrine may

not be a jury question. The fair use defense generally raises a mixed question of law and fact. In the first instance, the court must determine whether, as a matter of law, the use of copyrighted material in a specific case is entitled to fair use protection. Where the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could only reach one conclusion, it may render judgment as a matter of law in that party's favor without ever permitting the case to go to the jury. See Brady v. Southern Railway Co., 320 U.S. 476, 479-80 (1943); Fitzgibbons v. United States, 522 F.2d 1353, 1354 (5th Cir. 1975); Bertot v. School District No. 1, Albany County, Wyoming, 522 F.2d 1171, 1175-76 (10th Cir. 1975); Boeing Company v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969).

On the other hand there are many cases in which -- either because the relevant facts are in dispute or because the question is sufficiently close as to turn of necessity on the subjective judgment of the specific trier of fact -- it will be impossible for the court to find that there is fair use as a matter of law. In such cases the fair use question is necessarily a question of fact which must be decided by the trier of fact. It is in this latter kind of case that the right to a trial by jury becomes highly significant; for in such cases, a jury, properly instructed on the law, could very well render a

valid verdict different from that which might be rendered by the trial judge on the basis of the same evidence.

In this case, in accordance with the test of fair use set forth above, the scope of the use of copyrighted material by the defendants is relatively limited, and the purpose of the use of the letters does not appear to be to capitalize on the unique intellectual product of the authors. Here, whatever their literary quality, the letters are clearly used by the defendants to describe the feelings and thoughts of two of the major participants in the Rosenberg trial. Unlike the material used in Folsom v. Marsh, it cannot be said that defendants' work derives a significant part of its value from the use of the copyrighted letters. Defendants' work deals largely with the trial and legal proceedings following the trial prior to the Rosenbergs' execution. While the impact of the trial and conviction on the relationship between Julius and Ethel Rosenberg is undoubtedly a minor theme in the book, the limited use of the letters in the latter sections is not, in this court's view, quantitatively or qualitatively substantial in the context of the entire work. Nor is the copied material qualitatively or quantitatively substantial in the context of the copyrighted work. Undoubtedly, the qualitative impact of copyrighted passages is a matter that to some extent turns on individual subjective judgment. Nevertheless, the undisputed facts in the record in this case are so overwhelming that this

court finds that a reasonable jury could not reach the conclusion that the copying here is not entitled to fair use protection.

Rather than being used to exploit individual feelings or expressions of plaintiffs' parents, the excerpts from the letters, like the trial transcript and other source materials, are used to relate certain facts relative to the whole event. These letters in themselves are part of the historical record. Nizer could reasonably have believed that the only way in which he could effectively present the facts relating to the Rosenbergs' reactions to the trial was to quote verbatim from limited portions of the Rosenberg letters. Nizer thus had to rely in small part on works covered by plaintiffs' copyright to present most effectively the facts relevant to his book. Given the public interest in the trial and the events surrounding it, plaintiffs' copyright should not give them a monopoly on the use or dissemination of facts relating to this historical event.[11] This court thus believes the fair use doctrine protects defendants' right to use plaintiffs' copyrighted letters to the limited extent here, even if that use results in a dimunition of the value of the plaintiffs' copyright.[12]

For these reasons, this court holds that, as a matter of law, the use of this copyrighted material under the circumstances here is covered by the fair use doctrine, and thus summary judgment is appropriate as to all defendants.

Furthermore, insofar as the defendants Nizer and Doubleday are concerned, as the trier of fact, this court finds on the basis of its examination of the two books and all other facts in the record that as a matter of fact the use of the copyrighted Rosenberg letters in The Implosion Conspiracy constitutes a fair use. Thus, even if this court were in error in holding that the copying here is entitled to fair use protection as a matter of law, it would grant summary judgment in favor of the defendants Nizer and Doubleday on the basis of the undisputed facts.

Defendants' motion for summary judgment dismissing the complaint is thus granted.

So Ordered.

/s/ Thos. P. Griesa
U.S.D.J.

Dated: New York, New York
July 20, 1976.

FOOTNOTES

1. An appeal was apparently taken from the denial of the preliminary injunction, but was later withdrawn. See 505 F.2d 232, 237 (2d Cir. 1974).

2. The parties now agree that only 28 letters are covered by plaintiffs' statutory copyright effective in the United States. Two additional letters were copyrighted in the English edition.

3. The plaintiffs now agree that only 1,957 words are subject to the American copyright. They note, however, that there are two additional letters from which the plaintiffs have copied approximately 1,058 words that are copyrighted in the British edition of the Death House Letters. While plaintiffs concede that the copying of these letters may not have constituted a copyright infringement, they contend that the use of those letters, along with the copyrighted material serves to illustrate both the quality and quantity of the unlawful taking and use.

4. 361 F. Supp. at 1065.

5. The affidavit of Professor Chomsky for example concedes that there are some comments on legal strategy of the parties and errors in cross examination in Nizer's book that might be of value. The letter of Professor Genovese states that the book has some value "as a document in itself." The letter of Mr. Goldstein, the producer of a television program about the Rosenberg trial, states that the book was read "with interest particularly inasmuch as Nizer is a close associate of Kaufman and Saypol." The affidavit of Professor Falk indicates that Nizer's book is a work of entertainment, which a library collecting books for scholars might buy "for the sake of completeness." The affidavit of Professor Williams indicates that the work would have value as primary source material for a scholar undertaking a biographical study of the author.

6. In fact, as Judge Tyler pointed out, if anything the record before this court indicates that the publication of The Implosion Conspiracy may have enhanced the value of plaintiffs' copyright on their parents' letters.

7. In the case of a design infringement, for example, the sole issue may be whether one pattern is sufficiently similar to another one. With a copy of both designs before

the court, the question of their similarily is a factual one as to which two different arbiters of fact could draw different conclusions. It is not, however, necessarily a factual issue for trial.

8. This problem is discussed in Nimmer on Copyright §9.232 at 28.21--28, 32 where the earlier decision by Judge Tyler is described as "a difficult border-line case testing the principle. . . ." §9 at 28.30 n.208b (1975 Supp.).

9. In Folsom v. Marsh, the court stated:

> ". . . everyone must see, that the work of the defendants is mainly founded upon these letters, constituting more than one third of their work, and imparting to it its greatest, nay, its essential value. Without those letters, in its present form the work must fall to the ground." 9 Fed. Cas. at 349.

10. The cases cited by defendant in support of its contention that there is no such right to a trial by jury in this case either involved claims as to which money damages were not sought as in Cayman Music Ltd. v. Reichenberger, 403 F. Supp. 794 (W.D. Wisc. 1975) and Berlin v. Club 100, 12 F.R.D. 129 (D. Mass. 1951), or like Liberty Oil Company v. Condon National Bank, et al., 260 U.S. 235 (1922) are cases that were decided prior to the Supreme Court's decisions in Beacon Theatres, Inc. v. Westover, supra, Dairy Queen, Inc. v. Wood, supra, and Ross v. Bernhard, supra upholding the right to a trial by jury in cases in which there are both legal and equitable claims. The validity of these cases today is thus questionable. See, e.g., Hyde Properties v. McCoy, 507 F.2d 301, 305 (6th Cir. 1974); Jefferson Standard Insurance Company v. Craven, 365 F. Supp. 861, 863 (M.D. Penn. 1973).

11. There is also another related factor which should here be mentioned. Information about public figures and their reactions to the events of which they were a part is essential to the full and free discussion of those events by subsequent historians or anyone else who has an interest in them. To the degree that a public figure is the subject of historical research or attention, his family may have an interest in seeing him portrayed only in the most favorable light. In this kind of situation there is thus an inherent danger that members of the family of a historical figure may use a copyright on his writings as a means of suppressing unfavorable information or comment about him by later writers rather

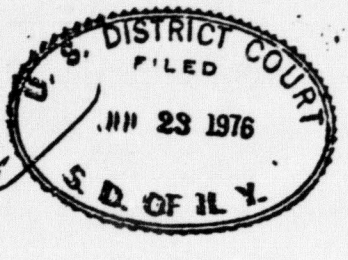
than for the legitimate protection of their proprietary interest in his intellectual product. Concern about this kind of misuse of the copyright laws was expressed by the concurring judges in Rosemont Enterprises, Inc. v. Random House, Inc., supra, who noted:

> ". . . it has never been the purpose of the copyright laws to restrict dissemination of information about persons in the public eye even though those concerned may not welcome the resulting publicity. 366 F.2d at 311.

While not an important factor in the decision here, the potential for misuse of the copyright laws with respect to letters of historical figures is an additional reason for construing the fair use doctrine liberally in cases like this one.

12. This court does not believe that under the circumstances here defendants' knowledge of the potential copyright infringement affects their right to claim fair use with respect to the copying of the copyrighted material. If, as has been here determined, defendants' use of the published material was legally permissible under the doctrine of fair use, then there was no necessity for them to attempt to obtain permission from the holder of the copyright. Their knowledge that the plaintiffs might contest their claim of fair use should not affect the legal validity of that claim. In Time Inc. v. Bernard Geis Associates, supra the defendants had actually attempted to obtain permission to use copyrighted material and it was specifically denied. Nevertheless, the court found the use to be a fair one citing the public interest in disseminating the copyrighted material. The copyright there was on frames from the Zapruder films of the Kennedy assassination -- material which was clearly more substantial in the context of the infringing work than that taken here.

JUDGMENT DATED JULY 23, 1976 DISMISSING THE COMPLAINT



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

MICHAEL MEEROPOL and
ROBERT MEEROPOL

Plaintiffs :

-against-

LOUIS NIZER, DOUBLEDAY & COMPANY, INC. and FAWCETT PUBLICATIONS, INC.

Defendants :

- X

73 Civil 2720 (LPG)

JUDGMENT

Defendants having moved the Court for summary judgment, pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Lee P. Gagliardi, United States District Judge, and the Court thereafter on July 20, 1976, having handed down its opinion granting the said motion, it is,

ORDERED, ADJUDGED and DECREED: That defendants LOUIS NIZER, DOUBLEDAY & COMPANY, INC., and FAWCETT PUBLICATIONS, INC., have judgment against plaintiffs MICHAEL MEEROPOL and ROBERT MEEROPOL, dismissing the complaint in its entirety.

Dated: New York, N.Y.
July 23, 1976

Raymond F. Burghardt
Clerk

NOTICE OF APPEAL OF MICHAEL MEEROPOL AND ROBERT MEEROPOL DATED AUGUST 20,1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -x

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Plaintiffs

- against -

LOUIS NIZER, DOUBLEDAY & COMPANY, INC. and FAWCETT PUBLICATIONS, INC.

Defendants.

- -x

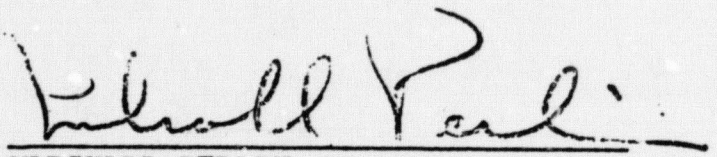
73 Civ. 2720 (LPG)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that MICHAEL MEEROPOL and ROBERT MEEROPOL, the plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the judgment entered in the within action on July 23, 1976, dismissing the complaint and supplementary complaint in their entirety, as well as from the order, opinion and findings of the HON. HAROLD T. TYLER, JR., then Judge of the United States District Court for the Southern District of New York, signed and filed on July 31, 1974, granting summary judgment to the defendants LOUIS NIZER and DOUBLEDAY & COMPANY, INC. on the second count of plaintiffs' complaint and dismissing the aforesaid count of the complaint, and from the order, opinion and findings of the HON. LEE P. GAGLIARDI, Judge of the United States District Court for the Southern

District of New York, signed and filed on July 20, 1976, granting summary judgment on the first and third counts of the complaint to the defendants LOUIS NIZER and DOUBLEDAY & COMPANY, INC., and dismissing said counts and each and every count of the complaint and granting summary judgment to the defendants LOUIS NIZER, DOUBLEDAY & COMPANY, INC. and FAWCETT PUBLICATIONS, INC., on the first, second and third counts of plaintiffs' supplementary complaint and dismissing said complaint in its entirety and each and every count thereof, as well as from such orders, determinations and rulings of the District Court in furtherance of said summary judgments and dismissals and the orders effecting the same, and from each and every part of said orders, opinions, findings and judgments.

Dated: New York, New York
August 20, 1976



MARSHALL PERLIN
Attorney for Plaintiffs
MICHAEL MEEROPOL and
ROBERT MEEROPOL
36 West 44 Street
New York, New York 10036
(212) 661 - 1886.

To:

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON, ESQS.
Attorneys for Defendant LOUIS NIZER
40 West 57 Street
New York, New York 10019

SATTERLEE & STEPHENS, ESQS.
Attorneys for Defendant
DOUBLEDAY & COMPANY, INC. and
FAWCETT PUBLICATIONS, INC.
277 Park Avenue
New York, New York 10017

1 Copies Received

Date FEBRUARY 1, 1977

Firm Phillips, Nizer, Benjamin, et al

By Bernard Rothman

1 Copies Received

Date FEBRUARY 1, 1977

Firm SATTERLEE & STEPHENS

By JHF